

# IMPROVING OVERSIGHT OF THE REGULATORY PROCESS: LESSONS FROM STATE LEGISLATURES

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## HEARING

BEFORE THE

SUBCOMMITTEE ON  
REGULATORY AFFAIRS AND FEDERAL  
MANAGEMENT

OF THE

COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
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# **IMPROVING OVERSIGHT OF THE REGULATORY PROCESS: LESSONS FROM STATE LEGISLATURES**

**THURSDAY, OCTOBER 26, 2017**

U.S. SENATE,  
SUBCOMMITTEE ON REGULATORY,  
AFFAIRS AND FEDERAL MANAGEMENT,  
OF THE COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:05 a.m., in room 342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Daines, Heitkamp, Carper, Hassan, and Harris

## **OPENING STATEMENT OF SENATOR LANKFORD<sup>1</sup>**

Senator LANKFORD. Good morning. Welcome to today's Subcommittee hearing entitled Improving Oversight of the Regulatory Process: Lessons from State Legislatures. This hearing provides an opportunity to do something Washington should do more often—listen. Listen and try to learn to see what States do well, especially when it pertains to regulations.

Today we have three States that have found effective ways for their legislatures to provide oversight over State rulemaking agencies. Strong and effective legislative oversight does not mean stopping agencies from issuing rules and it does not mean we must have an adversarial relationship with the regulators. When regulators do not trust or work with a legislature, they push the bounds of their authority. This leads to lawsuits, challenging nearly every aspect of rulemaking, which draws out the process, creating uncertainty for individuals and our communities.

On the other hand, as we will hear today, a cooperative relationship between agencies and the legislative body leads to more effective and efficient rules that follow legislative intent and incorporate the views of regulated parties. Regulators working closely with the legislature, results in regulations that face far fewer lawsuits from stakeholders.

The onus to improve the rulemaking process is not just on the regulators. As legislators, we must fulfill our responsibility to actually legislate. For decades, we have fallen into the habit of passing legislation that is vague on the details and tell the agencies to do

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<sup>1</sup> The prepared statement of Senator Lankford appears in the Appendix on page 27.

the hard work and figure out how to be able to apply it. Politically, this insulates the legislature, and we can say that we did our part but the agency messed up the implementation. It is not how government is supposed to work.

Many States, like Connecticut, North Dakota, actively review State regulations to ensure they follow legislative intent. Other States like Idaho codify State regulations after a year or they expire. This causes the legislature to take responsibility for not only the bills they pass but also for the regulations that are a direct result of those lost.

When we talk about regulatory reform, I frequently hear assertions that changes to our system will result in the ossification of the rulemaking process, clog the courts, prevent agencies from issuing needed regulations, or create significant risks to health, safety, or the environment. But many of the ideas that we have considered in Committee are already being used in success on the State level, and I think we can learn a lot today from this, so I am looking forward to the conversation.

With that I would recognize the Ranking Member, Heidi Heitkamp, for her opening remarks.

#### **OPENING STATEMENT OF SENATOR HEITKAMP<sup>1</sup>**

Senator HEITKAMP. Thank you, Chairman Lankford. First I would like to recognize a great friend and a great legislator, Joshua Boschee, who is from my home State of North Dakota. I have known Josh for a long time, fairly long time, and while he is a tremendous legislator he is an even better person, and I will tell you one of the finest North Dakota could send here. So thanks so much, Josh, for making the trip. He is someone who does not just talk about making things better. He rolls up his sleeves and goes to work, and I am glad that he can be here today to talk about how North Dakota does things right there back home.

So over the past 3 years we have been leading this Committee, we have spent a lot of time examining the regulatory process, from the basic framework of the rulemaking process to the doctrines that are applied in court to the nitty-gritty of how decisions are made on an agency level. From these examinations legislators have flowed—legislation has flowed, trying to adopt different ideas that have been discussed in those hearings.

What we have not done enough of is look beyond the process in Washington. This hearing is a great way to learn about the activities of our partners in governance, on the States, to learn about how they have tackled many of the same questions that we have considered in this Committee, and to basically let the 50 laboratories of government work and inform some of the practices that we do right here.

If anyone has been following this Committee, they know that frequently I ask about the intersection between Federal regulation and State regulation, because a lot of challenges that we have here, for overregulation, are duplicative regulation, or inconsistent regulation is really that push between State and local regulation and Federal regulation. And a lot of us believe that if the State is al-

<sup>1</sup> The prepared statement of Senator Heitkamp appears in the Appendix on page 29.

ready protecting public health and safety, that that is the level at which those institutions are most accountable.

And so we definitely want to hear not only your opinion about what you do but maybe some of the frustration about the duplication that you see in regulatory effort with Federal regulation.

And so with that, Mr. Chairman, congratulations. This is a great opportunity for us to learn a lot more about how things could work better and how we could work better with State regulators.

Senator LANKFORD. That is great. Thank you. At this time we will proceed with testimony from our witnesses. First up we have Mr. Scott Bedke. He is the Speaker of the Idaho House of Representatives, a position that he has held since 2012. He is serving his ninth term in the Idaho House, representing the 27th District. Speaker Bedke is a fourth-generation rancher from Oakley, Idaho.

Following him will be Mr. Joshua Boschée, who is representing North Dakota's 44th District in the North Dakota House of Representatives since 2013. He serves on the Government Finance Committee, Workers' Compensation Review Committee, and Administrative Rules Committee. Representative Boschée is a resident of Fargo, North Dakota, and I fully expect to keep a stroke count of how many times I hear, between the two of you, "oh yes, you betcha" today. [Laughter.]

So we will see if we can increase the number of times on that.

Senator HEITKAMP. Ya.

Senator LANKFORD. Third up will be Mr. Arthur O'Neill. He is representing Connecticut's 69th District in the Connecticut House of Representatives since 1988. He has served as the Chair of the Regulations Review Committee as well as the Ranking Member of the House Appropriations and Judiciary Committees. Representative O'Neill is a resident of Southbury, Connecticut. Thank you for being here as well.

It is a tradition of this Committee and the custom to be able to swear in all witnesses that appear before us, so I would ask all three of you to please stand and raise your right hand.

Do you swear the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BEDKE. Yes.

Mr. BOSCHÉE. Yes.

Mr. O'NEILL. Yes.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect all the witnesses have answered in the affirmative.

We do have a timing system. You can see a clock in front of you. As you start that will count down 5 minutes. We are not going to be strict on that but we do want to leave as much time as we can for questions, as Senator Heitkamp and I will pummel you with questions as soon as you finish up your oral testimony.

So, Speaker Bedke, you are up first.

**TESTIMONY OF THE HONORABLE SCOTT BEDKE,<sup>1</sup> SPEAKER  
OF THE HOUSE OF REPRESENTATIVES, STATE OF IDAHO**

Mr. BEDKE. Thank you, Senator, and Senator Heitkamp. Thank you for this opportunity to testify today.

Legislative review of Executive Branch rules is a topic of great and recent interest in Idaho. Over the past 25 years or so, the Idaho Legislature's authority to review Executive Branch rules has been the subject of Supreme Court cases and no less than two proposed constitutional amendments placed before the voters of our State. Within the past year, at the 2016 general election, the voters of Idaho approved a constitutional amendment providing that the legislature has the constitutional authority to review and approve or reject Executive Branch rules. As a result, the Idaho Legislature now has the constitutional authority to ensure Executive Branch rules are written in a manner consistent with the legislature's intent.

In Idaho, the legislature's authority to review and approve or reject Executive Branch rules has been in place in one form or another since 1969. In 1978, the legislature passed a statute authorizing legislative subcommittees to meet in an advisory fashion to either accept or reject administrative rules. This advisory process evolved over time through statute to provide a more formal and enhanced legislative role. This statutory evolution provided the legislature with authority to review administrative rules and, upon finding a rule inconsistent with the legislative intent to reject that rule through Concurrent Resolution. In Idaho, Concurrent Resolutions require approval of both the House and the Senate and are not subject to approval of the Governor.

In 1990, the legislature's authority to review and reject administrative rules was upheld by the Idaho State Supreme Court in a closely decided decision, with a 3–2 decision. The court reasoned that the Executive Branch's authority to write administrative rules is a power delegated to the Executive Branch by the legislature. As our Supreme Court has held repeatedly, only the legislature can make law.

The Idaho Legislature takes its responsibility in this area very seriously. Each legislative session starts with an in-depth review of the rules proposed in the preceding year. Each legislative committee reviews the rules germane to its area of expertise and makes recommendations to the House and Senate as to whether those rules should be approved or rejected.

The legislature has used its authority to reject rules judiciously. Over the past four decades, the legislature has reviewed more than 5,000 administrative rules and has rejected approximately 300, or approximately 6 percent. Often a rejected rule is proposed again by the same Executive Branch agency the next year, but with the changes necessary to make the rule consistent with the legislative intent of the statute. In Idaho's approach to this manner, the legislature's review of rules does not hamper Executive Branch authority. It only assures that State agencies are following the law in the rulemaking.

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<sup>1</sup> The prepared statement of Mr. Bedke appears in the Appendix on page 30.



The legislature acknowledges that at times Executive Branch agencies may not understand or appreciate the real-life impacts of their proposed rules, so legislative committees and their elected officials listen to input from everyday citizens as to how a new rule may affect them. To reiterate, the time we take during this process is to listen to our citizens, and it has not resulted in sweeping rejection of administrative rules. It has, however, resulted in selective rejection of rules, constructive dialogue with the Executive Branch, and, ultimately, we believe administrative rules that are more closely aligned with the intent of the underlying statute.

In order to safeguard the legislature's authority to review administrative rules, and in light of the close Supreme Court decision, the legislature chose to put a constitutional amendment before Idaho voters. The amendment placed the legislature's authority to review rules in the State's constitution. Recognizing the good government quality of this proposed amendment in the 2016 general election, a comfortable majority of citizens voted in favor of the constitutional amendment.

In summation, we believe that allowing Executive Branch agencies the unreviewed authority to promulgate and implement administrative rules compromises the legislature's authority to make law and, consequently, strengthens the Executive Branch at the expense of the Legislative Branch. The passage of the constitutional amendment strengthened and more clearly defined the legislature's authority to review and reject Executive Branch rules. We believe that this is just good government.

Thank you, and I look forward to your questions and our dialogue.

Senator LANKFORD. Thank you, Mr. Speaker. Mr. Boschee.

**TESTIMONY OF THE HONORABLE JOSHUA A. BOSCHÉE,<sup>1</sup> MEMBER OF THE HOUSE OF REPRESENTATIVES, LEGISLATIVE ASSEMBLY, STATE OF NORTH DAKOTA**

Mr. BOSCHÉE. It is an honor to be with you all this morning to talk about the administrative rules process in North Dakota and its relationship with the legislative assembly. As part of my testimony, I have provided a background memorandum prepared by our staff that was used as an introductory resource for our new members this past September. You will find that much of the technical aspects of my testimony are pulled directly from that memorandum.

During my time on the Administrative Rules Committee, I have found the process to be one that is very collaborative between administrative agencies, the regulated community, the public, and legislators. North Dakota has a cherished history of providing access and transparency to our State citizens when it comes to developing policies at all levels of government and authority. As part-time legislators who create, amend, and rescind statutes only 80 days out of each biennium, we rely on our State agencies to develop the policies and procedures required to enact the legislative changes made during each assembly.

Our State agencies, commissions, and regulatory boards are comprised of employees, elected officials, and appointed citizens who

<sup>1</sup> The prepared statement of Mr. Boschee appears in the Appendix on page 34.

provide technical expertise and real-world experiences that inform the rules being developed throughout the interim. Whether responding to a policy change made by the assembly, a new Federal regulation, or the dramatically changing economy North Dakota is experiencing, the administrative rules process continues to be one that allows good balance of legislative oversight and professional, executive independence.

In North Dakota, the Administrative Rules Committee is appointed, each biennium, with membership of the committee including at least one of the members who served during the most recently completed regular session of the assembly from each of the standing committees from either the House or the Senate. The committee meets quarterly to review administrative rules proposed by State agencies, as well as boards and commissions that have authority to regulate activities within the State.

The committee is responsible for studying and reviewing administrative rules and related statutes to determine one of three things: whether administrative agencies are properly implementing legislative purpose and intent; whether there is dissatisfaction with administrative rules or with statutes relating to administrative rules; or whether there are unclear or ambiguous statutes relating to administrative rules.

All rule changes, including a creation, amendment, or repeal, made to implement a statutory change, must be adopted and filed with legislative councils within 9 months of the effective date of the statutory change. If an agency needs additional time for the rule change, a request may be made to the committee and the committee may extend that time.

Additionally, the committee has the authority to establish standard procedures for administrative agency compliance, whether it is notice of requirements for proposed rulemaking, establishing a procedure to distribute administrative agency filings, and to receive notice of appeal.

A key component to our State's rulemaking process includes the Attorneys General (AG) review of agency rules. The AG may not approve a rule as to legality if the rule exceeds the statutory authority of the agency or the rule is written in a manner that is not concise or easily understandable, or procedural requirements for adopting the rules are not substantially met.

Agencies have the authority, with approval of the Governor, to adopt rules on an emergency basis, because of an imminent peril to public health, safety, or welfare; or because a delay is likely to cause loss of revenue appropriated to support a duty imposed upon an agency; or when reasonably necessary to avoid the delayed in implementing an appropriations measure; or when necessary to meet a mandate by Federal Government.

An emergency rule may be declared effective no earlier than the date of filing notice of rulemaking with the legislative council. An emergency rule becomes ineffective if it is not adopted as a final rule, through the formal administrative rules process, within 180 days after its declared effective date. An agency making emergency rules is required to attempt to provide notice of the emergency rules to persons the agency can reasonably be expected to believe

may have a substantial interest in the rules, as well as notification of the Chairman of the Administrative Rules Committee.

North Dakota's administrative rules process began in 1941, as the first State to adopt an Administrative Procedure Act (APA), which was based partly on an earlier tentative draft of what became the 1946 Model State Administrative Procedure Act approved by the Commission on Uniform State Laws.

Before 1977, agencies were authorized to adopt administrative rules, but there was no compilation or central source of these rules. During the 1977 session, the assembly enacted statute which requires the legislative council to compile those rules through a code. Two years later, in 1979, the legislative assembly enacted statutes providing for legislative review. And finally, in 1981, the legislative assembly authorized the committee to make formal objections to agency rules. If the committee objects to a rule because the committee determines the rule to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file the objection in certified form with the legislative council, with the burden falling upon the administrative agency to determine whether or not it meets statutory regulation.

In 1995, the legislative assembly enacted statutory authority for the committee to void all or any portion of the administrative rules on any of the following grounds: (a) the absence of statutory authority; (b) emergency relating to public health, safety, or welfare; (c) a failure to comply with express legislative intent or to substantially meet the procedural requirements of our century code, chapter 28, regarding the adoption of rules; (d) a conflict with State law; (e) arbitrariness or capriciousness; and (f) a failure to make a written record of its consideration or written and oral submissions respecting the rule during the hearing process and comment period.

During the 23 years the committee has had the authority to void rules, only eight rules have been voided.

Based on my experience, when the committee is considering the action of voiding rules, our practice is that we will table the section of rule of concern until the next meeting to allow the agency and any of the concerned public, whether it is individual citizens or the regulated community, ample time before the next meeting to come to an amicable agreement. This is rare and often comes up when the regulated community impacted by the new rules has strong objections that fall under one of the previously Stated grounds. It has been my experience that the agency and concerned stakeholder often find a resolution to the rules that are then presented to the next committee meeting.

If the committee finds a rule to be void, the legislative council has to provide written notice to Legislative Management. Within 14 days of receipt of the management, the adopting agency may file a petition with the Chairperson of Legislative Management for review by our legislative management for final decision. If the agency does not file a petition, the rule becomes void on the 15th day after adopting agency received notice from council. If, within 60 days after receipt of the petition, the adopting agency and Legislative Management has not disapproved the finding, the rule is found void.

In 2005, the legislative assembly enacted a bill providing that except for emergency rules, administrative rules do not become effective until after they have been reviewed by the Administrative Rules Committee. And in 2011, a final change was made that if an agency representative does not appear for a scheduled meeting, the rules will be held over to the next meeting.

Since 2015, each adopting agency has been required to provide proof to the committee with written information demonstrating that the agency complied with the processes related to notice of hearing, as well as written statements for people that objected, either orally or through written form.

Statute does allow the committee to change a rule after consideration of rules by the committee if the agency and the committee agree to rule changes is necessary to address any of the considerations for which the committee may find a rule to be void. This allows an agency to change an administrative rule when the committee expresses concern, and in those circumstances the agency is not required to commence a new procedure. If a rule change is agreed on by the committee and the agency, the rule must be reconsidered. If neither party objects to it, the rule has the opportunity to become effective as scheduled.

Because the legislative assembly recognized that there are constitutional questions about the Administrative Rules Committee voiding rules, an alternative amendment is on the books which will take effect if the State Supreme Court rules the authority to void rules is unconstitutional. The alternative amendment is the same in all respects as the amendment allowing the committee to void rules but the alternative, rather, provides an opportunity to suspend the rules until the next legislative session, for approval by the legislative assembly.

The Administrative Code, which contains all rules adopted by agencies, are subject to the Agencies Practices Act. It is published by the legislative council and has 129 titles. In North Dakota, 96 of those titles contain rules of administrative agencies with 16 agencies voluntarily publishing their rules within our code. The code is distributed free to each county auditor, to the Supreme Court justices, district court judges, and certain agencies, as well as can be accessed online through our legislative website for free by the citizens.

Based on our nearly 80-year evolution of the administrative rules process in North Dakota, I am confident that our process is one that works well for our State. Changes have been made gradually over time and have been implemented with little friction between the agencies that are developing the rules and the legislative assembly. The only concern I have with our State's process is ensuring that we continue to provide ample notification and time for citizens to participate in the process, as subscriptions to print newspapers decline, which is our formal process of notice, and we become more dependent on electronic means of official posting.

This concludes my prepared testimony and I am happy to try and answer any questions the Committee may have.

Senator LANKFORD. Thank you. Representative O'Neill.

**TESTIMONY OF THE HONORABLE ARTHUR O'NEILL,<sup>1</sup> MEMBER  
OF THE HOUSE OF REPRESENTATIVES, GENERAL ASSEMBLY,  
STATE OF CONNECTICUT**

Mr. O'NEILL. Thank you, Mr. Chairman, and good morning Ranking Member Heitkamp, Chairman, and Members of the Committee. Thank you for the invitation to testify.

I am a 27-year veteran of the Legislative Regulations Review Committee (LRRC) of Connecticut and have previously served 6 years as co-Chairman of the committee.

The Connecticut General Assembly first began reviewing regulations in 1945. The Secretary of State was required to submit to each General Assembly all the regulations promulgated during the preceding biennium for its study, legislature meeting only biennially. Any regulation which the General Assembly disapproved was void and not reissued.

In 1963, the first Regulations Review Committee was established by statute. This committee was and is a bicameral, bipartisan committee. It met during the interim between the sessions and could only disapprove regulations that were already in effect. This approval voided the regulation unless the General Assembly overrode the committee's action at its next session, but the General Assembly was not required to act on voided regulations.

In 1971, the current Legislative Regulations Review Committee was created pursuant to the Uniform Administrative Procedures Act (UAPA), which we adopted. Under the 1971 law, the committee was authorized to review proposed regulations. The committee's disapproval of a regulation in 1976 led to a lawsuit challenging the legislature's role on constitutional grounds, alleging a breach of the separation of powers principle. Connecticut Superior Court ruled that the committee's activity was unconstitutional. The Supreme Court overturned that lower court decision but they did so on technical grounds, leaving the issue of constitutionality unresolved until 1982, when a constitutional amendment, approved by the electorate, became effective and confirmed the legislature's authority to consider and disapprove administrative regulations.

The Regulation Review Committee was established to ensure proper legislative review of proposed agency regulations. Administrative regulations have the force of law; therefore, closer scrutiny and control by the Legislative Branch is clearly in the public interest to ensure that regulations do not contravene legislative intent.

The committee, which meets monthly, consists of 14 members, 6 Senators and 8 House members. There are equal numbers of Republicans and Democrats. There are two co-chairs, a Republican and a Democrat, one from each chamber. Each term the co-chairs alternate, so the Senator becomes the member of the opposite party and the House member does the same thing. This is a system of subcommittees which usually consists of two members, a Republican and a Democrat from each chamber.

The subcommittees are assigned to specific agencies. The subcommittees review, and if necessary, make changes to the regulations. The regulations and other required documents are provided to each committee member at least 1 month prior to the meeting

<sup>1</sup> The prepared statement of Mr. O'Neill appears in the Appendix on page 47.

at which the action is to be taken. Legal opinions and recommendations from our legal staff and fiscal analysis from our fiscal staff are provided to us 10 days before such meeting.

The committee can take the following types of action: approve in whole or in part; approve with technical corrections; reject without prejudice; or disapprove. Approval in part allows the committee to make deletions. When deletions are made, sections or subsections are deleted, not individual words. The committee cannot add words to a regulation.

Technical changes are sometimes needed to correct spelling, punctuation, statutory references, and matters of style. Frequently, regulations are rejected without prejudice for lack of statutory authority. Rejection without prejudice requires the agency to resubmit the regulation with appropriate corrections within either 35 or 65 days, depending on whether the regulation is mandatory or permissive. There is no limit to the number of times that a regulation can be rejected without prejudice.

Disapproval is rare and signifies the committee's interpretation that the proposed regulation is without statutory basis. Disapproval requires the regulation to be sent to an appropriate committee of the legislature for consideration during the next legislative session. The General Assembly then has the option to sustain or reverse the Regulation Review Committee's action. Inaction by the legislature sustains the action of the committee.

The committee meets as necessary to consider emergency regulations.

The committee functions as intended. It is effective as a mechanism to protect the legislative intent from Executive Branch dilution or distortion. It provides an opportunity for individuals interested in or affected by a regulation to influence the process without the time and expense of litigation. The committee's bipartisan and bicameral structure enhances its effectiveness.

Some agency staffers who must deal with the Regulations Review Committee do not want to deal with the committee and the additional process that we require. I consider that to be evidence of the effectiveness of the committee in defending the authority of the Legislative Branch.

And I welcome your questions.

Senator LANKFORD. Thank you, all three of you.

I will recognize Ranking Member Heitkamp.

Senator HEITKAMP. This is always a challenge because there are two functions, right? There is the oversight function, which we, as legislators, all believe is absolutely critical, and there is not any of us who have ever been legislators who have not said, that is not what we intended. I do not know why they are doing it that way. I mean, it seemed clear when we passed it. Why is not it clear to them?

But on the other side is this question of separation of powers, and whether, in fact, the Legislative Branch, being so critically involved and so strategically involved in regulatory analysis and potentially rewrite, that it flips over and results in a breach of that all-important separation of powers doctrine that is fundamental to State constitutions, fundamental to Federal constitutions.

So I want to explore kind of that line, and both of you—there is two of you who have basically said your States have confronted constitutional challenges, and the end result was a constitutional amendment in both cases—correct?—in the case of Idaho and Connecticut.

Can you just explain to me the various constitutional provisions you did enact, whether they were tailored very narrowly or whether it weighed on the side of greater participation of the legislature in implementation of legislation, or whether they really just helped clarify what, in fact, was the oversight responsibility?

And we will start with you, Representative Bedke.

Mr. BEDKE. We were very careful in drafting the words in the constitutional amendment. I kind of glossed over that we passed it on the second try. What was such old hat for the legislature, if you will, turned out to be not, so in 2014, the voters narrowly disapproved the constitutional amendment, but there was zero explanation there. Like I said, what seemed to be self-evident to us was obviously not to the general public.

I headed up a statewide campaign to go, to all the newspapers and all the media statewide, and explain what we were doing. So we were very careful. We believed that the line that we did not want to cross was, we could accept or reject, and when we—and the word says “in whole or in part,” but we—but that “in part” mean subsections of the rule.

So we stopped short of amending, we stopped short of the *Meade v. Arnell* case, upon which is the Idaho Supreme Court case which was the basis for all this, was clear, and we attempted to just codify that ruling and not overreach, because of all the reasons that you stated earlier. So we were very careful not to cross that line and we feel like we found the balance in there.

Now, the Executive Branch, through the Governor, objected to—came out with a campaign of his own, as did the State attorney general, saying that the legislature was overreaching. But we were very careful to delineate that line and not overstep, and we believe that it has resulted in the dynamic give-and-take that there needs to be at the State level. When the regulated public comes into the committee to testify about how it is affecting them, then their advocates are their elected officials, not the Executive Branch agency—and I mean no disparagement to those that work there, but they are not elected to represent the regulated public.

And so that insertion of having the elected officials usher that, the regulated public through the rules, which are laws, we believe holds us accountable as elected officials and gives the citizens a voice in the process, rather than just passing vague laws, passing it off to the Executive Branch, and wishing everybody good luck.

Senator HEITKAMP. Representative O'Neill, can you just explain kind of the constitutional development of your process?

Mr. O'NEILL. Sure. As I mentioned, we had a court case, *Maloney v. Pac.* The lower court said we were unconstitutional, what the committee did, and the supreme court overruled it, but as I said, on technical grounds. So the constitutionality issue was never really resolved by the supreme court. And so very shortly after that decision came down is when the constitutional amendment was passed by the legislature and voted for by the public.

And what that did was say a couple of things, one of which was that we clearly had the right to delegate the lawmaking function if we chose to administrative agencies, and the second thing was we also have the power to review and, if need be, reject, disapprove the regulations that were adopted by the agency.

It was a very short amendment. It was a broad grant of authority, really, to the legislature to pass laws to implement that constitutional provision. And so what it really did was, I believe, and it was intended to do at the time was to ratify the system that we had already created up until that point and to allow for its further development because it would be a clear constitutional basis for the committee to do what it was doing, and I think that is pretty much what it has done. I did not really change the way the committee was structured or the way the committee operated.

Senator HEITKAMP. Just legitimized it?

Mr. O'NEILL. I am sorry?

Senator HEITKAMP. Just legitimized it?

Mr. O'NEILL. Just legitimized it.

Senator HEITKAMP. I do not want to belabor this but I want to explain the challenges that we have, because there are Federal court cases that talk about so-called legislative vetoes, and whether that is, in fact, in violation of the continuum of responsibility under separation of powers. And so we do not have the luxury of a process that is very accessible for changing our Constitution. And so we have to make sure that when we are drawing those lines that we are staying well on the side of legitimate oversight in terms of our legislative process.

I, as a State agency, had both, as attorney general and as tax commissioner, spent a fair amount of time in front of the Administrative Rules Committee, justifying the rules. I think that having that process—I will tell you honestly—made us much more conscious of our outreach, much more responsive to concerns, and maybe even resulted in amendments, because we knew we were going to have that level of immediate accountability, not just judicial review but legislative review. And so I am someone who has seen that process work, both as an agency head and as somebody who fully participated. And so with that said, we are trying to figure out how your lessons, which seem to work really well in your States, how that can be kind of adapted and adopted here.

One thing I will remarks, it is interesting, in Idaho, I mean, you are basically a one-party government. I mean, there is not a very robust second party in Idaho. That is not true of Connecticut. Obviously, the Governor frequently can be, and is a Republican. I do not know when the last Democratic Governor you had, or Democratic Party legislature.

Mr. O'NEILL. It was Cecil Andrus, and so it has been a while, but there—of course, having a large majority party gives us the luxury of fighting amongst ourselves. And the Democrats, the minority in Idaho, they are not shrinking violets, and, if I may, most of our State constitutions—well, all of our State constitutions, with regard to the Article I provisions in the United States Constitution, I mean, they read very similarly. And, arguably, we have not let those Article I powers erode.



Senator HEITKAMP. Except in order to augment those Article I powers, you had to pass a constitutional amendment which is the point that I am trying to make, which is you may not have had, in Connecticut, you had a process, you were continuing that process under kind of color of authority. You clarified the authority and in your case, you responded to a critical and otherwise prohibitive court case. In North Dakota, we have not had that, in part, I think, because you have not reversed a lot of rules. And so we are just trying to figure it out.

Representative O'Neill can you talk a little bit—and I know I am taking up some time, but I know there is not a big—we are the nerds here. What can I tell you? Can you explain how you believe that the kind of party balance that you have in Connecticut affects your ability to do this work or whether you see challenges?

Mr. O'NEILL. Well, as I said, I think the bicameral, bipartisan nature of the committee helps it, because there is not the sense that it is one party that—let us say the majority party also is the majority party on the committee, would give the sense that this is basically coming from a partisan perspective. One of the little watch-words, phrases that we sometimes hear is that the other party is the opposition; the Executive Branch is the enemy. So we kind of—and that is spoken by both Republicans and Democrats because we all have similar experiences in trying to deal with an Executive Branch agency that is being recalcitrant.

So I think that we have a very partisan system. I mean, we do things on a very partisan basis in Connecticut. I am surprised that sometimes when I talk to people from other States that the partisanship is not as intense. We can be bipartisan as well. We have institutionalized it in some places, such as this committee, and it occasionally occurs that there will be a 7–7 split along party lines, but that is fairly rare.

And so most of the time the committee speaks with one voice, it is a unanimous decision, and the Executive Branch, whether it is the Governor or some commissioner who is trying to do something, or the treasurer because we review their regulations as well, and so on, gets the impression, this is the entity that is speaking on behalf of the legislature, as an entity.

Senator HEITKAMP. Yes. I just want to make this point before I turn it over. I think some of the hesitation is this idea that the executive gets elected, different political party, and then the Legislative Branch, and, therefore, there is an automatic way that you can limit the ability of the executive, who is of a different political party, to actually make decisions that are executive in nature and really executive.

What is interesting about your process—and we have been kind of chatting a little bit about it up here—is it really is about a legislative prerogative versus an executive prerogative, and building that support for the overreach in the executive. It is not a political thing. It really is a thing that challenges the relationship between legislative and executive, regardless of party.

Mr. O'NEILL. Yes. If I could just point out, in the years that I have been on the committee, we had a Democratic Governor, Bill O'Neill, when I first got on, Lowell Weicker, former United States Senator, was Governor as an independent for 4 years, we had Re-

publicans and then now we have a Democratic Governor, and the relationship between the committee and the Executive Branch has been pretty much the same consistently throughout all those different people, with their different political perspective and so forth.

Senator LANKFORD. So I have to ask the question, you said the relationships have been pretty consistent. Is that consistently bad or consistently good?

Mr. O'NEILL. I would say generally it has mirrored the relationship that the Governors have had with the legislature, in general.

Senator LANKFORD. So if they are contentious about the legislature, it is a contentious committee as well?

Mr. O'NEILL. Correct.

Senator LANKFORD. Because one of the challenges here in the conversation is, it is no grand secret to the world that we have this very adversarial relationship at times with regulatory bodies here, where a law comes out and then, in our situation, not uncommon to have a year or 2 or 3 years later the regulations that mirror up to that law come out, and they seem to be completely disconnected from the statute itself. And then you literally have a new legislature, that was not the one that voted on it. It is now past an election cycle, there is a new legislature there, and this hostile connection between was this the intent of Congress? Was this not the intent of Congress?

So my question for all three of you, if you want to just give me a quick answer on it, has this process improved the dialogue between the regulators and the legislature or have you seen a difference on that, or you all have done it so long you have not seen a real difference on it?

Mr. O'NEILL. I think the dialogue has improved compared to what it used to be. Before this committee was really activated in the early 1960s, and even as late as the 1980s, there were a lot of secret regulations. Regulations were passed. You could not find them anywhere. The regulation books were years behind, in terms of publication, and they were very hard to get a hold of. They were not really even available in law libraries. Now we have everything online. I mean, that is obviously the electronic revolution that has facilitated that.

But I think the committee has produced, and embedded into the process that the Executive Branch deals with, the idea that they are going to have to explain all of this in public and answer, and even to the point where agencies will withdraw regulation—I did not mention that but they can withdraw regulations up until the very moment we take it up, because they are afraid that it will get rejected, and that is considered to be a mark of dishonor, so to speak, within the agency.

Senator LANKFORD. That would be very helpful. By the way, there are secret regulations in the Federal Government as well, among many, because it is a guidance, where a regulated entity, a business, whatever it may be, will contact their regulator and will say, "I need some advice on this," and they will give them oral counsel on it but will not put it in writing, and that becomes a big issue as well, because then it depends on your regulator, what your regulations are.

So I want to complete the two of you to able to ask the relationship between the regulators and their legislature.

Mr. BOSCHEE. In our State, in North Dakota, very similar to Idaho, it is a very strong one party across State agencies as well as within the legislature, and we are more representative of the fact that there is an equal—there is a proportionate number of Democrats on the committee as there are Republicans, based on the elected body.

And so the relationship, I think, is pretty good and has continued to be good, and part of that, I think, is because as a legislative body we have implemented the system. We have created the rules of the administrative rules process. And so the administrative branch has to follow those rules and if they step out of line of the rules we have established, then we are in check there. And we have found great success there.

Additionally, I think it is important to note North Dakota's legislators, we often see ourselves as citizens first, legislators second. And so we participate in the administrative rules process not only as a check but also, during that hearing process, often you will see in the notes legislators participating in the field hearings or the hearing information up front. And so because of that, we are engaged with our community and the guidelines, and I think the regulators then get a good feel, especially if it is something, for instance, that has to do with agriculture community, and there are legislators who practice agriculture but also represent those communities, are very involved on the front end, not just waiting on the back end for it.

Senator LANKFORD. Speaking as someone who has practiced agriculture as well as a legislator. Speaker Bedke, do you want to jump in on this, and talk about their relationships?

Mr. BEDKE. Yes, I do. As was said, our system it mirrors North Dakota's. And so, there is proportional representation on these committees. These actually are the standing committees that break themselves out into subcommittees, because all of the rules are reviewed, and most of them go right through. The ones that do not come back to the full committee, and based on the prerogative of the chairman, they will have a hearing.

But as in North Dakota, the legislators are involved in this negotiated rulemaking that happens out in the field, because the agencies notice up their meetings, we have to promulgate some rules here to address this issue, and the local legislators show up. So they are involved in that process.

We are a part-time legislature as well. We do meet every year. But, anyway, we are directly involved there.

There is always creative tension, you might say, between the legislative intent and the Executive Branch. Regardless of party, regardless of sameness of party, there is always some creative tension, at best, that can devolve into something else, at worst. And so it keeps everyone honest, this back and forth. If the agency overreaches, then there is a self-governing check that happens in the rules review process. If the regulated agency is trying to get away with something or makes assertions that end up to not be true, then there is a check back on them, and the legislature has the

ability to say, "Yes, regulated industry, that is exactly what we meant, and we do support this rule."

So it balances out, and it is a custom and culture in Idaho to—that says this is true, good faith, negotiated rulemaking, because of this check and balance, that you have to come back to the legislature, and if there is anything untoward on either side of the table, so to speak, then that comes out in the hearing process, and it is corrected. And so it works well. I referenced good government. It is just basic good civics. It involves the elected official in the process. He becomes accountable to that regulated industry and becomes the advocate in the process with the Executive Branch, and it makes us write tighter laws, and then be involved to the final implementation of the rules out with the regulated public.

Senator LANKFORD. Yes, accountable all the way to the end. Senator Carper.

#### **OPENING STATEMENT OF SENATOR CARPER**

Senator CARPER. Thanks. My first question would be for Mr. O'Neill. Are you from Connecticut?

Mr. O'NEILL. Yes, sir, I am.

Senator CARPER. Why do you always have such good women's basketball teams? Seriously.

Mr. O'NEILL. Well, I would have to give a lot of the credit to the coach, Geno Auriemma, and once you have developed a great reputation. But there are a lot of good women basketball players in Connecticut. My daughter was a star at Trinity at one time.

Senator CARPER. No kidding. All right.

On a more serious note, I am a recovering Governor, and had the opportunity to be Chairman of the National Governors Association (NGA) at one time, and I used to love to come before Congress and testify. And because Delaware is so close by, and I was the Vice Chairman and the Chairman, I got called on quite a bit. I love to do that. And you know why? Because it is the issues that they were discussing on most days, I actually knew more than they did about them. And it was just very helpful.

And today it is kind of—I am reminded of that situation because you all know a lot more about this than some of us. And I have always said that the States can be laboratories of democracy, and this is a case where you all can really help us out, and I think help out the country.

I have not read verbatim your testimonies but I am going to ask each of you to just give me maybe the two most important points in your testimony so that I can just mull that over, and then I have a couple of questions. But just give me the two most important points in each of your testimonies. Mr. Bedke.

Mr. BEDKE. Two important points. Number one, we have always done rules review, at least in recent history, since the late 1960s, it became the custom and culture in Idaho to do that. We always knew there was a separation of powers issue that we did not want to cross. We orient new legislators on that because you will have firebrands that come in and think that they can come in, that this is the legislature's prerogative to rewrite the rules. We caution them against the—we remind them of the Supreme Court prece-

dents that we have nationally as well as at the State level. And it was ultimately challenged by a then-Governor.

Senator CARPER. Which one?

Mr. BEDKE. It was Cecil Andrus in a health and welfare case. And so the legislature prevailed there, with a 3–2 decision, and that made everybody tighten up our practices for the ensuing decades. But it was such a good government practice, as we described earlier, that we thought we should codify that decision in the State's constitution, and that is what we ultimately did, and it is working. That is my take-home message.

Senator CARPER. All right.

Mr. BEDKE. And I believe, as seems to be the prevailing sentiment here, that there are some things that the Federal Government could do that would emulate this process, and it may iron out some things. Frankly, you all are not passing a lot of laws. The laws that are—

Senator CARPER. I have noticed that. Good thing we do not get paid this year by all the bills we pass.

Mr. BEDKE. So the interaction with the Federal Government and our Nation's citizens happens at the rules and regulation and guideline level. And that is an abdication, I believe, of the legislative branch's power, and we need to balance that back, and that will have the effect of good government. It does not predict an outcome but it just ensures a good-faith, good process.

Senator CARPER. All right. Thank you. Mr. Boschee, Joshua, like in the Bible.

Mr. BOSCHEE. Yes. Thank you, Senator, I think the two most important aspects of the North Dakota process is that we are truly a review process. We do have the power to void but in the 23 years we have had that power we have only used it eight times, and that is really built off of, I think, the process being one in which we are involved as citizens as legislators, but then also on the back end, for that final review piece.

I think the second part is our flexibility throughout the process. We do provide the opportunity that if a rule that has been proposed and they are out in the field doing hearings and taking testimony from folks, they are able to augment those rules a little bit to accommodate those concerns that are presented, as well as at the committee level, we can help amend, especially if there are last-minute concerns. If things have changed in the last 90 days that need to be adapted, we provide that opportunity throughout our process. We are responsive and flexible.

Senator CARPER. Good. I am going to come back and ask you a question about why only 8 times in 23 years, but I will get that in the next round.

Mr. O'Neill, two great takeaway points from you, please.

Mr. O'NEILL. Yes, I think that the greatest strength of our system is that it has been institutionalized so that everyone accepts it. Our most recent Governor, Governor Malloy, has been something of an exception. He has tried a couple of times to undermine or weaken the regulation review process but the institution, the legislature, has resisted those efforts, and I think it is accepted regardless of party.

Senator CARPER. What is his motivation?

Mr. O'NEILL. I think what he was claiming was that he wanted to streamline the regulation process by eliminating the review piece, which, of course, would streamline things, and nobody would know, necessarily, what was going on or be able to act as a check, which was the whole point of the review.

Senator CARPER. Have you talked to him about this?

Mr. O'NEILL. Not personally, directly. I have spoken with his aides that bring us these proposals and things like that, and they have said, "Well, because we think it would make things go more smoothly," or because he wants to deregulate a lot of things and wants to pass deregulatory types of regulations, repeal things, and when repealers are done we look at them as well. So that was suggested as the reason why he was trying to do that.

Senator CARPER. In Delaware, when our legislature was in session, we were in session off and on from January 1 through June 30th, and they were out for weeks at a time, doing budgets and stuff like that. But whenever they are in session, in Dover, if a legislator—House, Senate, Democrat, Republican—wanted to meet with me, I would meet with them that day. We would find time.

Mr. O'NEILL. Yes. I do not know that Governor Malloy does that, and, in fact, I—

Senator CARPER. You might want to meet with him and say, "I talked to a recovering Governor from Delaware and he said this is what he did with his legislators." And I will say this—we had eight great years. It delighted a Republican House and Democratic Senate, and got along probably as well with the House as with the Senate. It works.

OK. Go ahead. Your second point?

Mr. O'NEILL. In addition to that is that I would say another strength of ours is that unlike what I am hearing from the other members of the panel, we reject a lot of regulations. Now that does not mean that they are dead forever because they are supposed to bring them back right away and fix them and correct them. We disapprove, which is really kill the regulation forever, very rarely, once every 4 or 5 years. So we do have an ongoing dialogue after we reject the regulation, with the agency. That is when we really get into a dialogue with the agency.

If we look at what they have done and say, "You got it wrong and here is why we think it is wrong. Sit down and work with us, or, more importantly, have your lawyers talk to our lawyers and work out the details," and that is when we, I think, are able to resolve conflicts and give the public a real opportunity to weigh in on those challenged ones, is when we have that dialogue of sometimes rejecting them two or three times before we get final approval.

Senator CARPER. Thank you. Now, Joshua, I mentioned that I was going to come back and ask you about 8 times in 23 years you actually voided regulations. Why so few? That is a surprisingly low number.

Mr. BOSCHEE. Senator, one of our practices on the committee is often if it comes to the review process to us and there are contentions between the regulated community and the agency, we often will table the rule for the quarter, and that is basically a shot across the bow to the regulators, saying, figure this out with the

regulated community so we do not void these on you, and often-times it has been resolved and it is amicable. They show up at the next meeting and say, "We have kumbaya-ed. We have figured it out and we would appreciate you all to approve what we have changed." So, again, that flexibility that we allow. They do not have to re-notice. They do not have to re-hear. If they make that change, that is amicable, and we do not have to be in a contentious situation. It will then be reviewed at that point.

Senator CARPER. OK. Could I just ask one more? Do you mind?

Senator LANKFORD. Yes, you can.

Senator CARPER. One says yes. The other says no. The Democrat said no. I am a Democrat. That is bipartisan.

Do you have a lookback, generally—one of the things Barack Obama did when he was President, as my colleagues will recall, is he asked, I think it was Cass Sunstein, who was the head of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), asked him to do a regular lookback, and just look back at our existing regulations and see which ones would I keep, which ones we have to get rid of. And we got rid of, quite a few over time. Do you all have that policy in your State, Mr. O'Neill?

Mr. O'NEILL. Yes. We actually started doing that about 20 years ago. We passed legislation that required all of the agencies to review all of their regulations. We had a schedule of them to come in and report to us and tell us which ones ought to be removed from the books, and that worked well the first time we did it because there was a strong impetus to do it.

They were supposed to come in on a 5-year rolling schedule to keep on doing this, and that has not worked out. So what we recently did was we shifted the responsibility for handling that from the Regulation Review Committee to the substantive committee. So a transportation regulation would be brought over to the Transportation Committee for them to decide, because they have a more regular contact with an agency to decide about those kinds of things. So this is new. We have not really seen how it works. We just changed the law last year. But after the first go-around, it just never seemed to get off the ground again, to keep going with that regularly scheduled review.

Senator CARPER. That makes sense. OK.

Mr. BOSCHEE. For us, Senator, we have not wholesalely—or wholesaled the process such as Connecticut. But generally, what we find is that when an agency brings forward something to do with a section of code and they want to update, or something is not relevant anymore, they will update it at that time and that is part of the process.

Senator CARPER. I see. Thank you. And Scott.

Mr. BEDKE. I think that the fact that we, maybe, North Dakota and Idaho, reject so few rules, and maybe we do more than they do, but I think that this involvement and this process that we are used to that has happened for decades preempts some of the problems. And so it has this leveling effect because no one tries to gain the system at the advantage of the other party. And so I think that we preemptively solve a lot of the problems because everyone knows that they are going to have to stand tall in front of the legis-

lature, whether it is the regulated community or the agency, and justify their actions, and that has the effect of creating better behavior on both sides.

In Idaho, we were able to also look back—everything—every rule is fair game. So the ones that are pending, if they become permanent, then we are—and there becomes a problem that everyone missed, then we are able to pull those back and review those again. But it prompts a negotiated rulemaking afterwards, and while we are in session, of course, they cannot promulgate a rule, but as soon as we leave then there becomes another temporary rule and they try to employ the lessons that they have just learned, or the new information that has just come forward.

So I think the involvement preempts problems, and thus we have fewer rules rejected, because we have been doing it for a while and we have kind of found our own level.

Senator CARPER. Great. Well, we have lot of folks who come and testify before us but this is an extraordinary panel, and we—some nice common-sense, practical, just really good advice, and straight talk. We appreciate that, and I hope you enjoy your stay here and you will come back and help us with other problems. All right? We will put you on retainer.

Senator HEITKAMP. I have a quick question. Have any of your States looked at judicial review and whether there had been a reversal of a lot of rules before your process, and whether, in fact, there has been a decline, and probably maybe even an elimination of judicial reversal of regulations as a result of this process?

Mr. BEDKE. That is an interesting question, Senator, and I can have the research done, but I do not have a straight answer for you at this point.

Senator HEITKAMP. Off the top of your head, do you have any recollection at all of a recent censure process, since the constitutional process went into effect, of the court voiding any rule that came through this process?

Mr. BEDKE. Keep in mind we only elevated this to the constitution last November—

Senator HEITKAMP. OK.

Mr. BEDKE [continuing]. And so we have not had a challenge yet. But I believe that new legislators are going to have to be careful with the wording that we use, and if we begin amending rules—

Senator HEITKAMP. You are in trouble.

Mr. BEDKE [continuing]. Rather than just accepting or rejecting, I believe—and I am not a lawyer, and forgive me for bragging—[Laughter.]

I believe that there is a line out there over which we should not cross, but we have not been challenged yet. Of course, that were some of the assertions in the campaign leading up to the constitutional amendment, that this was going to be challenged and what-not, but the opponents could not come up with a scenario that was not addressed in our process. Now, my friend from North Dakota has gone into great length in the technical aspects of your State's process. We have a similar technical way that we do it all. And so the opponents that debated me, during the campaign leading up to this, we were able to go into depth and to allay those concerns in



a way that allowed the process, or the measure, to pass with nearly 60 percent of the vote.

Senator HEITKAMP. Yes. I think one of the points that I am trying to make is that listening to you all, we are worried about whether you are usurping executive authority, but you are almost acting like a first judicial review of the regulation. And so where we have focused on this separation of powers, a lot of what you are doing is what you would expect a court to do on the front end. And I am just wondering if you see a reduction in the number of regulations that have been voided by the court because you have gone through this process.

Senator LANKFORD. Let me add one thing to that and I definitely want to hear this answer. The court has the responsibility in law to define what the law says. You are actually saying, no, this is what the law says and you are not following it as a regulation. So that is why we are jumping into this. We have lots of follow-up questions on this issue at Judicial Review, but let us keep going.

Mr. O'NEILL. We have been at it so long it is hard to tell, in terms of challenges, other than the Pac decision where it was voided, or the committee already was challenged as unconstitutional at the lower-case court and then later on was not, but that case was overturned but not resolved.

We do not get a lot of court cases, as far as I can tell. I certainly could go through and see. We can try and do a comparison. Things were so different in the way people would be able to go to court and challenge things, back in the 60s, I would say, for regulations, before this committee really got rolling in the 70s. It would be hard to do a comparison.

I do know that periodically, so people do still challenge our regulations—we will hear, because we are told, we have to subpoena all the records from the review committee's proceedings to bring to the court because they are challenging a regulation on the grounds that something is being done, either inconsistent with that the committee told them to do and what the regulation was rewritten to say, or they are claiming somehow that there was something wrong with what the committee did. But that does not happen on a, as far as I can tell, a very regular basis. My impression is that most issues that would provoke a court action are resolved at the committee level. It is certainly one of the things I think of as strong points of this process is that you can avoid unnecessary litigation because you have someone on the bureaucracy side who simply will not listen.

So that is my impression. We do not get a lot but we still do get some.

Senator LANKFORD. OK.

Mr. BOSCHEE. And my recollection is, we have not had too many court cases, judicial cases, related to this. But what I have seen, and I would have to think of an example—I cannot do it off the top of my head right now—is that advocates for a judicial change may go to an agency and say, “Can we make a change through the administrative rules process?”

Senator LANKFORD. Say that again.

Mr. BOSCHEE. Where advocates of a change—so instead of taking—

Senator LANKFORD. So an outside citizen group.

Mr. BOSCHEE. Right.

Senator LANKFORD. OK.

Mr. BOSCHEE. Or a business entity group, regulated community would go to the agency and say, "Instead of us doing this, can we come to compromise through the administrative rules process?" And, again, we have not had a constitutional challenge so that is unique, I think, compared to my colleagues here.

Senator LANKFORD. Fine. I am still back in the same position. I am trying to figure out the process here, because, again, we see the animus. We are trying to figure out what is a legal process. What other States have done as they have walked through this.

Several years ago, the House of Representatives was frustrated with the President—and I can fill in the blanks on this—basically not applying the law as they saw that had been written and done. And so they went to the court. The court, actually, for the first time, went to the President and said, no, the President does not have the constitutional authority to be able to do this. Here is what the law says. And, literally, the House of Representatives was suing the Executive Branch to go through that.

That case is now determined. It is a famous case now dealing with the Affordable Care Act. But that is a case where the House is actually filing a suit against the actions of the President. What I am trying to figure out is, is that the natural connection point here, where at the Judicial Branch, which really says what the law says, steps into a regulation and says that regulation is not consistent with that group? And the reason it comes up so often here is, by the time the regulation is promulgated, it is a different Legislative Branch.

You are saying it is already so with you all as well, that the promulgation of the rule and the finalizing of the rule, it is a new legislative group after an election that is actually going back and reviewing it. That has been the contentious point. It is not the same people writing it, literally. It is the same body but not the same people writing it, also saying this is what we meant or did not mean by it. Does that make sense?

Mr. BEDKE. It does, and I believe that in—but because of the practice back at the State levels that we have described here, there are fewer aggrieved parties. And so going to the court for redress or relief is, that relief has been granted in the process that led up to the writing of the rule. And, so I do not presume to understand all the ins and outs of here, but you have, available to you, the Congressional Review Act (CRA) that you have employed—

Senator LANKFORD [continuing]. As recently as this week.

Mr. BEDKE. That is right. And so that allows by concurrent resolution or—but the President has to sign that. Now we do not have that. The Executive Branch does not have to sign off on these. Many States have the ability. As we were doing our research for this constitutional amendment, there are many States that have rules where you process but they have to do that rules review with a bill that is passed as both bodies, and then is signed into effect by the Governor.

And, I will use the phrase that is the "fox guarding the hen-house" to a point, very lightly. I mean no disparagement. But that

would seem to violate the separation of powers on the other side of the issue. It is the legislature's prerogative to make the laws, executive carries them out, the judiciary—this is basic civics, and that is why I believe that it works so well. And, over time, if it is allowed to work, then you preempt a lot of problems.

Senator LANKFORD. But that is the challenge of the Congressional Review Act, is that it does require Presidential signature, and often you have an Executive Branch creating a regulation that the Legislative Branch may say, no, that is not consistent with the law, but you have to go get approval from the people that wrote it the first time.

Mr. BEDKE. That is my use of the term “the fox guarding the henhouse.”

Senator LANKFORD. Yes. No, I picked up the nuance there on that, but that is also why it has only been used 15 times in the history of the Congressional Review Act, and it has always been with the transition of the White House.

Mr. BEDKE. And, if I may, the political stars have to line up so that the President is of the same party—

Senator LANKFORD. Right.

Mr. BEDKE [continuing]. As the—you get it.

Senator LANKFORD. I do. So the retrospective, or going back and looking at old regulations as well, for all three of your States, you could look at any regulation, at whatever year, at whatever time. Is that correct, or is there a time limiting that you can only review it for the first year, or once it is promulgated or finalized? Do you have the ability to be able to look at any regulation at any time?

Mr. BEDKE. We do. In Idaho we do.

Senator LANKFORD. OK.

Mr. BOSCHEE. I believe we do. I will double-check and get back to you.

Senator LANKFORD. Representative O'Neill?

Mr. O'NEILL. The committee cannot initiate that process other than through this legislation that we have that requires the agencies to periodically report. As I said, we just changed that. The committee gets regulations before they go into effect, but they do not go into effect unless the committee approves them or lets them go through—

Senator LANKFORD. So your committee has the ability—they propose the rule, go through the final language, the committee has the conversation. Before it ever goes into effect it has to be signed off by your committee.

Mr. O'NEILL. That is correct.

Senator LANKFORD. OK. Same for both of you as well? It cannot go into effect until it has a signature?

Mr. BEDKE. For Idaho, it is after the fact. All of the rules that are promulgated come back to the legislature, and if there is a rule that is in the archives or is not a pending rule for that year, then an individual legislator drafts the concurrent resolution, brings that to the committee, and then the committee has the prerogative to go back. Certainly the ones that are permanent rules—well, nothing is permanent—

Senator LANKFORD. I have noticed.

Mr. BEDKE [continuing]. But there is a greater buffer of protection, if you will, from the legislature there than there is. But an individual legislator can draft a resolution, bring that to the committee. If the chair agrees then it proceeds.

Senator LANKFORD. OK. Go ahead, Representative Boschee.

Mr. BOSCHEE. I was going to say, we do not sign off as part of our review. The committee only would vote on the review if we have made a language change as part of the process. So if we amend it to make it more friendly to the regulated community, or if something happened in the last 30 days that we need to also make part of this rule, then we would, as a legislative action of the committee, change it.

Senator LANKFORD. But you could change text, add text to the regulation.

Mr. BOSCHEE. Correct.

Senator LANKFORD. Both of you are basically saying you are not adding many words. You could delete words or get rid of it entirely.

Mr. BEDKE. That is correct, Senator.

Mr. O'NEILL. That is right. We cannot add a word.

Senator LANKFORD. OK. This is extremely helpful. Let me ask one last question on that. I would be very interested in anything else you want to contribute to the record, here, to be able to get in.

My one last question is, is there a State that you would recommend that we also look at, based on your own research and your own interaction with other States, to say they also—we do not do it exactly like they do but I think you should look at that State and how they do it?

Mr. BEDKE. Senator, right off the top of my head I cannot think of other States, other than Connecticut, which is what we looked at a lot in the lead-up to ours. You will find that many States have a similar process, maybe, in the low 20s, and then there will be the rest of the States, in the high 20s, that have the insertion of the Governor in the process, I believe.

Senator LANKFORD. The fox in the henhouse conversation.

Mr. BOSCHEE. I am sorry. I am not able to provide any other States.

Senator LANKFORD. OK. There is no State better than North Dakota, is what you are saying.

Mr. BOSCHEE. Correct.

Senator LANKFORD. OK. I get it.

Mr. O'NEILL. Well, I am always told that Connecticut has sort of been the creator of the most advanced system in this.

Senator LANKFORD. You have had a lot time to be able to develop this system.

Mr. O'NEILL. Yes.

Senator LANKFORD. OK. Gentleman, I appreciate it very much. What I would ask of you is as you have other ideas and thoughts on it, feel free to be able to share that with me or with our staff, because we continue to be able to gather these ideas.

This has been an issue that plagues us, because of the number of regulations that we have and the number of agencies that are creating them, and the difficulty of the checks and balances. The Office of Management and Budget process was created to try to

help Congress manage that, though it is in the Executive Branch, but we are still in the same mode of trying to figure out how to be able to manage that and how to be able to get back to, Speaker Bedke, as you mentioned as well, the person that is elected being held accountable when the final regulation is done.

My only thought is, is there a moment when the Executive Branch has to challenge the Legislative Branch, that when you see—let us say a bill is passed, the regulation is done, the legislature looks at it and says, “That is too onerous. That is too over-reaching,” and their response is, “That is what the law says. This is the only way to do what you asked us to do,” that the Legislative Branch has to come back and say, “You are right. There is not another way to do it. We stretched it that we have to pass something new.”

Has that happened to you all, where there has been a challenge to be able to step back and say, “We have to fix the statute because we asked them, the regulators, to do something that will be so expensive or so onerous that we are going to have to pull back the statute.” That becomes, again, a judicial question where the judiciary can step in and say, “No, that is what the law really says.”

Mr. BEDKE. Senator, that has a ring of familiarity to me. I do not have the specifics but I believe that we have done a double-take. This return and report that is baked into this process gives pause both to, I am sure has given pause to the legislature in Idaho before, and then have gone back through the regular process and addressed the underlying issue in the law. And, not that we admit to mistakes on the legislature side—

Senator LANKFORD. Of course not.

Mr. BEDKE [continuing]. But maybe things happen, and, anyway, we go, “Oh, I can see—”

Senator LANKFORD. I would tell you I have had some colleagues that voted for the Dodd-Frank proposal when it came out, and after the regulations started being promulgated they said, “I did not realize it would mean that.” And so there is some push and pull on it.

Mr. BEDKE. Naturally, and that should precipitate a law change.

Senator LANKFORD. Right. Any thoughts on that?

Mr. O’NEILL. Yes. We actually have one of those cases pending right now. We had a legislation that called upon, I believe, public health and the Department of Environmental Protection to develop some regulations jointly. They created the regulations and then each of the commissioners wrote us a letter saying that these are terrible regulations but we are doing what you asked us to do, and if you look at the consequences of imposing these kinds of regulations you are going to be jeopardizing public health, because it changes a lot of things about allowing people to sell foods that have not been properly tested, and that sort of thing.

Clearly, somebody had an idea, it went through the process, and it did not get carefully enough reviewed before it became statutory law. And so what we have done, in the committee—and this may be an example of us stretching—said we are going to reject it, even though it does what the law says, we are rejecting it without prejudice, and do not bring it back until after the legislature has had a chance to sit down and review all of this again. So this does cre-

ate that kind of an opportunity for the agency to have a second go at the legislative process and say, "Did you really mean to do that?" And we now have concluded no, we really did not.

Senator LANKFORD. That is extremely helpful.

Gentlemen, thank you again. Let us keep the dialogue going as we try to work this out. At some point, when we finally get it all resolved, you will be able to tell your grandchildren "I fixed that," and was a part of helping getting that resolved. So I appreciate it very much.

Any final comments? Anything that needs to get on the record?

Mr. BEDKE. And let us tell our children, not our grandchildren.

Senator LANKFORD. Yes. I would be very good with that. Any other final comments?

Mr. BOSCHEE. Thank you for the opportunity.

Senator LANKFORD. Thank you. Thank you all for being here.

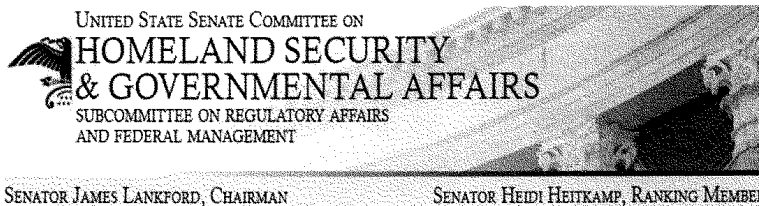
I will make a final statement and announce the next hearing. Today's hearing is concluded. The hearing record will remain open for 15 days until the close of business on November the 10th, for the submissions of statements and questions for the record.

This hearing is adjourned.

[Whereupon, at 11:24 a.m., the Subcommittee was adjourned.]

## A P P E N D I X

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### Opening Statement

#### Hearing before the Regulatory Affairs and

#### Federal Management Subcommittee

Thursday October 26th at 10:00 AM

#### **“Improving Oversight of the Regulatory Process: Lessons from State Legislatures.”**

Good morning and welcome to today’s Subcommittee hearing titled “Improving Oversight of the Regulatory Process: Lessons from State Legislatures.”

This hearing provides an opportunity to do something Washington should do more often: listen to and learn what states do well, especially as it pertains to regulations.

Today, we have three states that have found effective ways for their legislatures to provide oversight over state rule-making agencies.

Strong and effective legislative oversight does not mean stopping agencies from issuing rules, and it does not mean we must have an adversarial relationship with regulators.

When regulators do not trust or work with the legislature, they push the bounds of their authority.

This leads to lawsuits challenging nearly every aspect of a rulemaking, which draws out the process – creating uncertainty for individuals and our communities

On the other hand, and as we will hear today, a cooperative relationship between agencies and the legislative body leads to more effective and efficient rules that follow legislative intent and incorporate the views of regulated parties.

Regulators working closely with the legislature, results in regulations that face far fewer lawsuits from stakeholders.

The onus to improve the rulemaking process is not just on the regulators. As legislators, we must fulfill our responsibility to actually legislate. For decades, we have fallen into the habit of passing legislation that is vague on details and tells the agencies “you make the difficult decisions.”

Politically, this insulates us. We can say we did our part and passed a bill to solve a problem; it is the agency who messed up implementation. That is not how our government is supposed to work.

We can learn a lot from state legislatures in this regard.

Many states, like Connecticut and North Dakota, actively review state regulations to ensure they follow legislative intent.

Other states, like Idaho, must codify state regulations after a year or they expire.

This causes the legislature to take responsibility not only for the bills they pass, but also for the regulations that are a direct result of those laws.

These states prove that an active legislature that works closely with agencies can be successful without needlessly slowing down the regulatory process.

When we talk about regulatory reform, I frequently hear assertions that changes to our system will result in the ossification of the rulemaking process, clog the courts, prevent agencies from issuing needed regulations, and create significant risks to health, safety, and the environment.

We should not be afraid of regulatory reform. Many of the ideas we are considering in Committee are already being used with success on the state level and I hope my colleagues will recognize the successes in the many states can be duplicated on the federal level.

With that, I recognize Ranking Member Heitkamp for her opening remarks.



October 26, 2017

**Opening Statement of Senator Heidi Heitkamp  
Ranking Member, Homeland Security and Governmental Affairs  
Subcommittee on Regulatory Affairs and Federal Management**

**“Improving Oversight of the Regulatory Process: Lessons from State  
Legislatures”**

Thank you, Chairman Lankford. First, I would like to recognize Representative Joshua Boschee, from my home state of North Dakota. I have known Josh for quite some time, and while he is a tremendous legislator and representative of the citizens of District 44, he is an even better person. He is someone who doesn't just talk about how to make things better; he rolls up his sleeves and gets to work. I am so glad that you could be here today to talk about how North Dakota does things.

Over the three years we have been leading this committee, we have spent a lot of time examining the regulatory process - from the basic framework of the rulemaking process, to the doctrines of the courts, to the nitty gritty of how decisions are made at the agency level. From these examinations, legislation has flowed to try to adopt different ideas that have been discussed in those hearings.

What we have not done enough of is look beyond the process of Washington. This hearing is a great way to learn about the activities of our partners in governance, the States. To hear about how they have tackled these questions. I look forward to hearing from our witnesses.

**Rep. Scott Bedke, Speaker of the Idaho House of Representatives**  
**Testimony Regarding Legislative Review of Administrative Rules**  
**Before the Senate Subcommittee on Regulatory Affairs and Federal Management**  
**Thursday, October 26, 2017**

Good Morning, I'm Scott Bedke, state representative from the state of Idaho and Speaker of the Idaho House of Representatives. Thank you for the opportunity to testify today.

Legislative review of executive branch rules is a topic of great (and recent) interest in Idaho. Over the past 25 years or so the Idaho legislature's role and authority to review executive branch rules have been the subject of state Supreme Court cases and no less than two proposed constitutional amendments placed before the voters of our state. The role of the Legislature in this matter certainly implicates the constitutional separation of powers issues as well as very practical day-to-day matters of public policy. Within the past year, at the 2016 November general election, the voters of Idaho approved a constitutional amendment providing that the Legislature has the constitutional authority to review and to approve or reject executive branch rules. As a result, the Idaho Legislature now has the constitutional authority to ensure executive branch rules are written in a manner consistent with the Legislature's intent of the statute the rule is designed to implement.

**Background and Idaho Supreme Court Decisions**

In Idaho, the Legislature's authority to review and approve or reject executive branch administrative rules has been in place in one form or another since 1969, when the Legislature amended the state's Administrative Procedure Act. In 1978, the Legislature passed a statute authorizing legislative rules review subcommittees to meet in an advisory fashion to either object or not object to administrative rules under review. This "advisory" process evolved over time through statute to provide for a more formal and enhanced legislative role.

This statutory evolution provided the Legislature with authority to review administrative rules and, upon finding a rule inconsistent with legislative intent, reject that administrative rule through the adoption of a Concurrent Resolution. (Concurrent Resolutions require approval only of both houses of the Legislature—they are not subject to approval of the Governor.)

In 1990, the Legislature’s authority to review and reject administrative rules was upheld by the Idaho Supreme Court in a closely decided case with a 3-2 decision. (*Meade v. Arnell*, 1990). The Court has reasoned that the executive branch’s authority to write administrative rules is a power delegated to the executive branch by the Legislature. That executive power, however, is subordinate to the Legislature’s constitutional power to make law. As our Supreme Court has held repeatedly, only the Legislature can make law. Because our Court has found the executive branch’s authority to write rules is an authority delegated to that branch by the Legislature, the Court has traditionally upheld the Legislature’s right to review rules.

#### **Idaho’s Current Process of Rules Review**

The Idaho Legislature takes its responsibility in this area very seriously. Each legislative session starts with an in-depth review of the rules proposed in the preceding year by executive branch agencies. Each legislative committee reviews the rules germane to its area of expertise and makes recommendations to the House and the Senate as to whether those rules should be approved or rejected. The Legislature has used its authority to reject rules judiciously. Over the past four decades, the Legislature has reviewed more than 5,000 administrative rules and has rejected approximately 300, or about six percent. Often, a rejected rule is proposed again by the same executive branch agency the next year but with the changes necessary to make the rule consistent with legislative intent of the statute. In Idaho’s approach to this matter, the Legislature’s review of rules does not hamper executive branch authority—it only assures that state agencies are following the law in their rulemaking.

The Legislature acknowledges that, at times, executive branch agencies may not understand or appreciate the real-life impact of their proposed rules. In the Legislature’s review of

administrative rules, committees listen to input from everyday citizens as to how a new rule may affect them. To reiterate, the time we take during this process to listen to our citizens has not resulted in sweeping rejection of administrative rules. It has, however, resulted in selective rejection of rules, constructive dialogue with the executive branch, and ultimately, we believe, administrative rules that are more closely aligned with the intent of statute.

#### **Why a State Constitutional Amendment?**

In order to safeguard the Legislature's authority to review administrative rules, and in light of the close decision in *Meade v. Arnell*, the Legislature chose to put a constitutional amendment before Idaho voters. The amendment placed the Legislature's authority to review rules in the state's Constitution. As I noted earlier, the Legislature's authority to review rules had been provided for in statute, but that statute was challenged in *Meade v. Arnell* (1990).

The 2016 Joint Resolution authorizing a vote on the constitutional amendment won nearly unanimous approval from the Legislature (it received 96 yes votes; 4 no votes; 5 absent) and was passed by a majority of citizens casting a ballot on the amendment during the November 2016 election (it passed by approximately 56% to 44%—a margin of 69,000 votes statewide). The adopted constitutional amendment reads:

“The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho.” (emphasis added)

I should note that we took two swings at this matter via constitutional amendment. The first attempt at the ballot box came up short in the 2014 general election. That election involved an amendment similar but not identical to the 2016 amendment; the 2014 amendment lost by approximately 51% to 49%—4,700 votes statewide. The second effort—the 2016 election

effort—benefited from a more vigorous and focused campaign in which the amendment passed by approximately 69,000 votes statewide.

### **Conclusion**

In summation, the passage of the constitutional amendment strengthened and more clearly defined the Legislature's authority to review and reject executive branch rules. Further, the amendment strengthened the Legislature's constitutional lawmaking authority while improving our citizens' ability to participate in their government via review of administrative rules. We believe that allowing executive branch agencies the unreviewed authority to promulgate and implement administrative rules compromises the Legislature's authority to make law and, consequently, strengthens the executive branch at the expense of the legislative branch.

**Representative Joshua A. Boschee, ND - District 44**

**Testimony before the Senate Subcommittee on Regulatory Affairs and Federal Management  
Committee on Homeland Security and Government Affairs  
United States Senate**

**October 26, 2017**

It is an honor to be with you all this morning to talk about the administrative rules process in North Dakota and its relationship with the Legislative Assembly. As part of my testimony, I have provided a background memorandum prepared by the ND Administrative Rules Committee's staff that was used as an introductory resource for new Committee members for our September 12, 2017 meeting. You will find that much of the technical aspects of my testimony are pulled directly from that memorandum.

During my time on the Administrative Rules Committee, I have found the process to be one that is often very collaborative between administrative agencies, the regulated community, the public and legislators. North Dakota has a cherished history of providing access and transparency to our state's citizens when it comes to developing policies at all levels of government and authority. As part-time legislators who create, amend and rescind statutes only 80 days out of each biennium, we rely on our state agencies to develop the policies and procedures required to enact the legislative changes made during each Assembly. Our state agencies, commissions and regulatory boards are comprised of employees, elected officials and appointed citizens who provide technical expertise and real world experiences that inform the rules being developed throughout the interim. Whether responding to a policy change made by the Legislative Assembly, a new Federal regulation or the dramatically changing economy North Dakota is experiencing, the Administrative Rules continues to be a process that allows a good balance of legislative oversight and professional, executive independence.

In North Dakota, the Administrative Rules Committee is appointed, each biennium, with membership of the Committee including at least one of the members who served during the most recently completed regular session of the Legislative Assembly from each of the standing committees of either the House of Representatives or the Senate. The Committee meets quarterly to review administrative rules proposed by state agencies, as well as boards and commissions that have authority to regulate activities within the state. The Committee is responsible for studying and reviewing administrative rules and related statutes to determine whether:

- Administrative agencies are properly implementing legislative purpose and intent.
- There is dissatisfaction with administrative rules or with statutes relating to administrative rules.
- There are unclear or ambiguous statutes relating to administrative rules.

All rule changes, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the Legislative Council within 9 months of the effective date of the statutory change. If an agency needs additional time for the rule change, a request for additional time must be made to the Committee. The Committee may extend the time within which the agency must adopt the rule change if the request by the agency is supported by evidence the agency needs more time through no deliberate fault of its own.

Additionally, the Committee has the authority to establish standard procedures for administrative agency compliance with notice requirements for proposed rulemaking, establish a procedure to distribute copies of administrative agency filings of notice of proposed rulemaking, and receive notice of appeal of an administrative agency's rulemaking action.

A key component to our state's rule making process includes the Attorney General's review of agency rules. The AG may not approve a rule as to legality if the rule exceeds the statutory authority of the agency or the rule is written in a manner that is not concise or easily understandable, or procedural requirements for adopting the rule are not substantially met.

Agencies have the authority, with approval of the Governor, to adopt rules on an emergency basis because of imminent peril to the public health, safety, or welfare; because a delay is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency; when reasonably necessary to avoid a delay in implementing an appropriations measure; or when necessary to meet a mandate of federal law. An emergency rule may be declared effective no earlier than the date of filing notice of rulemaking with the Legislative Council. An emergency rule becomes ineffective if it is not adopted as a final rule, through the Administrative Rules process, within 180 days after its declared effective date. An agency making emergency rules is required to attempt to provide notice of the emergency rules to persons the agency can reasonably be expected to believe may have a substantial interest in the rules, meaning an interest in the effect of the rules which surpasses the common interest of all citizens. Additionally, the agency is required to notify the Chairman of the Committee of emergency rules and their effective date and grounds for emergency status. Legislative Council is then required to place the notice of emergency rules on its website.

North Dakota's Administrative Rules process began in 1941, as the first state to adopt an Administrative Procedure Act, which was based partly on an earlier tentative draft of what became the 1946 Model State Administrative Procedure Act approved by the Commissioners on Uniform State Laws.

Before 1977, agencies were authorized to adopt administrative rules, but there was no compilation or central source for administrative rules. In 1977 the Legislative Assembly enacted statute which requires the Legislative Council to compile and publish the Administrative Code.

Two years later, in 1979, the Legislative Assembly enacted statutes providing for legislative review of administrative rules.

In 1981, the Legislative Assembly authorized the Committee to make formal objections to agency rules. If the Committee objects to a rule because the Committee determines the rule to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the Committee may file that objection in certified form with the Legislative Council. The effect of the filing of a Committee objection is that the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish the rule is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court is to declare the rule invalid, and judgment is to be rendered against the agency for court costs, including a reasonable attorney's fee.

In 1995, the Legislative Assembly enacted statutory authority for the Committee to void all or any portion of the administrative rules on any of the following specific grounds:

- An absence of statutory authority.
- An emergency relating to public health, safety, or welfare.
- A failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32 regarding adoption of the rule.
- A conflict with state law.
- Arbitrariness and capriciousness.

- A failure to make a written record of its consideration or written and oral submissions respecting the rule during the hearing process and comment period.

During the 23 years the Committee has had the authority to void rules, only eight rules have been voided.

Based on my experience, when the Committee is considering the action of voiding rules, we will table the section of rule of concern until the next meeting to allow the agency to work with the appropriate stakeholders to amend the rules. This is rare and often comes up when the regulated community impacted by the new rules has strong objections that fall under one of the previously state grounds. It has been my experience that the agency and concerned stakeholder find an amicable resolution to the rules that are then presented at the next Committee meeting.

If the Committee finds a rule to be void, the Legislative Council is to provide written notice of the finding to the adopting agency and to the Chairman of the Legislative Management. Within 14 days after receipt of the notice, the adopting agency may file a petition with the Chairman of the Legislative Management for review by the Legislative Management of the decision of the Committee. If the adopting agency does not file a petition for review, the rule becomes void on the 15<sup>th</sup> day after the adopting agency received the notice from the Legislative Council. If within 60 days after receipt of the petition from the adopting agency the Legislative Management has not disapproved the finding of the Committee, the rule is void.

In 2005, the Legislative Assembly enacted a bill providing that, except for emergency rules, administrative rules do not become effective until after the rules have been reviewed by the Committee.

A 2011 change provides that if an agency representative does not appear at the scheduled meeting, the rules automatically are held over for consideration. This change further provides if a representative does not appear at the subsequent meeting the rules are void if the rules are emergency rules and otherwise the Committee may void, approve, or carry over consideration of the rules. A rule carried over for consideration is delayed in taking effect until the first day of the calendar quarter following the meeting at which the rule is reconsidered.

Since 2015, each adopting agency has been required to provide the Committee with written information demonstrating that the agency complied with the processes and requirements provided in statute including the type of public notice given and the extent of the public hearings held on the rules, whether a regulatory analysis was required, what type of economic impact statement of impact on small entities was completed, the fiscal effect of the rules on state revenue and expenditures, whether a constitutional takings assessment was prepared. Other information provided includes whether the rules resulted in statutory changes made by the Legislative Assembly, federal statute or regulation, what written or oral complaints were received through the notice period and hearing process, the approximate cost of giving public notice and holding the hearing and if the rules are being adopted as emergency rules.

Statute does allow the Committee to change a rule after consideration of rules by the Committee if the agency and Committee agree the rule change is necessary to address any of the considerations for which the Committee may find a rule to be void. This allows an agency to change an administrative rule when the Committee expresses concern and in those circumstances the agency is not required to commence a new rulemaking proceeding. If a rule change is agreed to by the Committee and the agency, the rule must be reconsidered, if requested by the agency or any interested party, at a subsequent Committee meeting and public comment on the agreed rule change must be allowed. If the agency or any interested party does not make such a request, the amended rule become effective as scheduled.



Because the Legislative Assembly recognized there are constitutional questions about the Administrative Rules Committee voiding rules, an alternative amendment will take effect if the North Dakota Supreme Court rules the authority to void rules is unconstitutional. The alternative amendment is the same in all respects as the amendment allowing the Committee to find rules void except under the alternative amendment the Committee may not find a rule to be void but may suspend a rule or portion of a rule. The effect of a suspension is the rule becomes ineffective temporarily and will become permanently ineffective unless it is ratified by both houses of the Legislative Assembly during the next legislative session. The amendment requires the agency seeking ratification of a suspended rule to introduce a bill for that purpose. The authority of the Legislative Management to reverse the decision of the Committee also applies in the case of a suspension of a rule.

The North Dakota Administrative Code, which contains all rules adopted by administrative agencies that are subject to the ND Administrative Agencies Practices Act, is published by the Legislative Council. The North Dakota Administrative Code consists of 129 titles. Ninety-six titles contain rules of administrative agencies with sixteen agencies voluntarily publishing their rules in the Administrative Code, although these agencies are excluded from the definition of administrative agency. The Administrative Code is distributed free to each county auditor, Supreme Court justice and district court judge, and to certain state agencies. Any other interested party can purchase a personal copy of the Administrative Code for \$60 or may access it for free, online at <http://www.legis.nd.gov/agency-rules/north-dakota-administrative-code>.

Based on this nearly 80-year evolution of the Administrative Rules process in North Dakota, I am confident that our process is one that works well for our state. Changes have been made gradually over time and have been implemented with little friction between the agencies that are developing the rules and the Legislative Assembly. The only concern I have with our state's process is ensuring that we continue to provide ample notification and time for citizens to participate in the process, as subscriptions to print newspapers decline and we become more dependent on electronic means of official posting and notification.

That concludes my prepared testimony and I am happy to try and answer any questions committee members may have.

**Representative Joshua A. Boschee, ND - District 44**

**Appendix A - North Dakota Administrative Rules Committee Background Memorandum Prepared by  
North Dakota Legislative Council (September 2017)**

**Testimony before the Senate Subcommittee on Regulatory Affairs and Federal Management  
Committee on Homeland Security and Government Affairs  
United States Senate**

**October 26, 2017**

**ADMINISTRATIVE RULES COMMITTEE - BACKGROUND MEMORANDUM**

North Dakota Century Code (NDCC) Section 54-35-02.5 requires the Legislative Management, during each biennium, to appoint an Administrative Rules Committee in the same manner the Legislative Management appoints other interim committees. The membership of the Administrative Rules Committee includes at least one of the members who served during the most recently completed regular session of the Legislative Assembly from each of the standing committees of the either the House of Representatives or the Senate.

North Dakota Century Code Section 54-35-02.6 requires the Administrative Rules Committee to review administrative rules adopted under NDCC Chapter 28-32. The committee is responsible for studying and reviewing administrative rules and related statutes to determine whether:

1. Administrative agencies are properly implementing legislative purpose and intent.
2. There is dissatisfaction with administrative rules or with statutes relating to administrative rules.
3. There are unclear or ambiguous statutes relating to administrative rules.

**NORTH DAKOTA ADMINISTRATIVE CODE**

The North Dakota Administrative Code, published by the Legislative Council pursuant to NDCC Section 28-32-19, contains all rules adopted by administrative agencies subject to NDCC Chapter 28-32 (the Administrative Agencies Practice Act). The North Dakota Administrative Code consists of 129 titles. Ninety-six titles contain rules of administrative agencies. Sixteen agencies voluntarily publish their rules in the Administrative Code, although these agencies are excluded from the definition of administrative agency. The remaining titles are either repealed, reserved, defunct, or declared unconstitutional.

North Dakota was the first state to adopt an Administrative Procedure Act, enacting the first version of NDCC Chapter 28-32 in 1941 based partly on an earlier tentative draft of what became the 1946 Model State Administrative Procedure Act approved by the Commissioners on Uniform State Laws.

Under NDCC Section 28-32-20, the Administrative Code is distributed free to each county auditor, Supreme Court justice and district court judge, and to certain state agencies. There are 56 free subscriptions. The Legislative Council is required, by NDCC Section 28-32-20, to establish prices for paid subscriptions to the Administrative Code. These prices were \$460 for a new "starter" code set and \$260 per year for supplements. From 1994 to 2011, the number of paid subscribers to the Administrative Code declined from 104 to 14. Beginning with the July 2010 publication, the Administrative Code has been published in a CD-ROM format, eliminating the ring binders and replacement pages previously used. This allowed subscriber costs to be reduced to \$60 per year, with no need to buy a full "starter" set of the code.

The numbering for the Administrative Code is similar to the numbering used for the Century Code. However, while Century Code sections are designated by numbers having three parts separated by hyphens, Administrative Code section numbers consist of four parts separated by hyphens--the first part designates the agency (title), the second part designates the major activity or division within the agency (article), the third part designates the subject within the major activity (chapter), and the fourth part designates the rule (section).

**STATUTORY PROVISIONS FOR RULES REVIEW**

Before 1977 agencies were authorized to adopt administrative rules, but there was no compilation or central source for administrative rules. In 1977 the Legislative Assembly enacted NDCC Section 28-32-19 (originally

Section 28-32-03.1), which requires the Legislative Council to compile and publish the Administrative Code. From July 1978 to September 2005, Administrative Code supplements were published the month after rules were filed with the Legislative Council for publication. Since September 2005, Administrative Code supplements have been published on a calendar quarterly basis. The current deadlines and effective dates are:

Filing Date	Committee Meeting Deadline	Effective Date
August 2-November 1	December 15	January 1
November 2-February 1	March 15	April 1
February 2-May 1	June 15	July 1
May 2-August 1	September 15	October 1

Although rules differ in length and complexity, comparison of the number of administrative rules sections affected during biennial periods is one method of comparing the volume of administrative rules reviewed by the Administrative Rules Committee since its creation in 1979. The following table shows the number of sections of the Administrative Code amended, repealed, created, superseded, reserved, or redesignated during each identified time period:

Time Period	Number of Sections
July 1979-October 1980	1,440
November 1980-August 1982	916
September 1982-November 1984	1,856
December 1984-October 1986	1,280
November 1986-October 1988	2,681
November 1988-October 1990	2,325
November 1990-October 1992	3,079
November 1992-October 1994	3,235
November 1994-October 1996	2,762
November 1996-October 1998	2,789
November 1998-November 2000	2,074
December 2000-November 2002	1,417
December 2002-November 2004	2,306
December 2004-October 2006	1,353
January 2007-October 2008	1,194
January 2009-October 2010	1,451
January 2011-October 2012	907
January 2013-October 2014	1,383
January 2015-October 2016	2,108

For committee review of rules, the Legislative Council prepares an Administrative Rules Committee supplement containing all rules changes submitted for publication since the previous committee meeting. The supplement is prepared in a style similar to bill drafts--changes are indicated by overstrike and underscore. Comparison of the number of pages of rules amended, created, or repealed is another method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of pages in committee supplements during each designated time period:

Time Period	Supplement Pages
November 1992-October 1994	3,809
November 1994-October 1996	3,140
November 1996-October 1998	4,123
November 1998-November 2000	1,947
December 2000-November 2002	2,016
December 2002-November 2004	4,085
December 2004-October 2006	1,920
January 2007-October 2008	1,663
January 2009-October 2010	2,011
January 2011-October 2012	2,399
January 2013-October 2014	2,116
January 2015-October 2016	2,938

In 1979 the Legislative Assembly enacted the statutes providing for legislative review of administrative rules. In 1995 the Legislative Assembly enacted statutory authority for the Administrative Rules Committee to void administrative rules on specific grounds. In 2005 the Legislative Assembly enacted a bill providing that, except for emergency rules, administrative rules do not become effective until after the rules have been reviewed by the committee.

North Dakota Century Code Section 54-35-02.5 directs the Legislative Management to appoint biennially an Administrative Rules Committee and to designate the Chairman of the committee. The committee is to operate according to the statutes and procedures governing the operation of the Legislative Management interim

committees. However, because the committee is established by statute, the committee is not discharged upon making its report to the Legislative Management at the end of the interim and the committee may be called to meet at any time, including during a legislative session.

North Dakota Century Code Section 54-35-02.5 provides it is the standing duty of the committee to review administrative rules adopted under NDCC Chapter 28-32. North Dakota Century Code Section 54-35-02.5 requires the committee membership to include at least one member from each standing committee of the House of Representatives or Senate in the most recently completed regular legislative session.

#### **Objection to Rules**

In 1981 the Legislative Assembly enacted NDCC Section 28-32-17 (originally Section 28-32-03.3) authorizing the Administrative Rules Committee to make formal objections to agency rules. If the committee objects to a rule because the committee determines the rule to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form with the Legislative Council. The effect of the filing of a committee objection is that the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish the rule is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court is to declare the rule invalid, and judgment is to be rendered against the agency for court costs, including a reasonable attorney's fee.

#### **Voiding of Rules**

In 1995 legislation was enacted to expand the authority of the Administrative Rules Committee in reviewing rules. North Dakota Century Code Section 28-32-18 allows the committee to find all or any portion of a rule is void if the committee makes the specific finding that there is:

1. An absence of statutory authority.
2. An emergency relating to public health, safety, or welfare.
3. A failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32 regarding adoption of the rule.
4. A conflict with state law.
5. Arbitrariness and capriciousness.
6. A failure to make a written record of its consideration or written and oral submissions respecting the rule during the hearing process and comment period.

North Dakota Century Code Section 28-32-18 allows the Administrative Rules Committee to find a rule void if the rule is initially considered by the committee not later than the 15<sup>th</sup> day of the month before the date of the Administrative Code supplement in which the rule change is scheduled to appear. If the rule is initially considered within the required timeframe, the committee may carry consideration of a rule to one subsequent committee meeting for purposes of the decision on whether to void the rule. A 2011 change, which amended NDCC Section 28-32-18, provided if an agency representative does not appear at the scheduled meeting, the rules automatically are held over for consideration. This change further provides if a representative does not appear at the subsequent meeting the rules are void if the rules are emergency rules and otherwise the committee may void, approve, or carry over consideration of the rules. A rule carried over for consideration is delayed in taking effect until the first day of the calendar quarter following the meeting at which the rule is reconsidered.

If the Administrative Rules Committee finds a rule to be void, the Legislative Council is to provide written notice of the finding to the adopting agency and to the Chairman of the Legislative Management. Within 14 days after receipt of the notice, the adopting agency may file a petition with the Chairman of the Legislative Management for review by the Legislative Management of the decision of the committee. If the adopting agency does not file a petition for review, the rule becomes void on the 15<sup>th</sup> day after the adopting agency received the notice from the Legislative Council. If within 60 days after receipt of the petition from the adopting agency the Legislative Management has not disapproved the finding of the committee, the rule is void.

North Dakota Century Code Section 28-32-18 allows a rule change to be made after consideration of rules by the Administrative Rules Committee if the agency and committee agree the rule change is necessary to address any of the considerations for which the committee may find a rule to be void. This allows an agency to change an administrative rule when the committee expresses concerns and in those circumstances the agency is not required to commence a new rulemaking proceeding. If a rule change is agreed to by the committee and the agency, the rule must be reconsidered, if requested by the agency or any interested party, at a subsequent committee meeting and public comment on the agreed rule change must be allowed.

Because the Legislative Assembly recognized there are constitutional questions about the Administrative Rules Committee voiding rules, an alternative amendment to NDCC Section 28-32-18 will take effect if the North Dakota Supreme Court rules the authority to void rules is unconstitutional. The alternative amendment is the same in all respects as the amendment allowing the committee to find rules void except under the alternative amendment the committee may not find a rule to be void but may suspend a rule or portion of a rule. The effect of a suspension is the rule becomes ineffective temporarily and will become permanently ineffective unless it is ratified by both houses of the Legislative Assembly during the next legislative session. The amendment requires the agency seeking ratification of a suspended rule to introduce a bill for that purpose. The authority of the Legislative Management to reverse the decision of the committee also applies in the case of a suspension of a rule.

The Legislative Management has assigned the Administrative Rules Committee the responsibility under NDCC Sections 28-32-07, 28-32-10, and 28-32-42 to approve extensions of time for administrative agencies to adopt rules, establish standard procedures for administrative agency compliance with notice requirements for proposed rulemaking, establish a procedure to distribute copies of administrative agency filings of notice of proposed rulemaking, and receive notice of appeal of an administrative agency's rulemaking action.

## **RULEMAKING PROCEDURES**

### **Agency and Rule Defined**

North Dakota Century Code Section 28-32-01(2) defines administrative agency as:

[E]ach board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency must be treated as part of that agency to the extent it purports to exercise authority subject to this chapter. The term administrative agency does not include:

- a. The office of management and budget except with respect to rules made under section 32-12.2-14, rules relating to conduct on the capitol grounds and in buildings located on the capitol grounds under section 54-21-18, rules relating to the classified service as authorized under section 54-44.3-07, and rules relating to state purchasing practices as required under section 54-44.4-04.
- b. The adjutant general with respect to the department of emergency services.
- c. The council on the arts.
- d. The state auditor.
- e. The department of commerce with respect to the division of economic development and finance.
- f. The dairy promotion commission.
- g. The education factfinding commission.
- h. The educational technology council.
- i. The board of equalization.
- j. The board of higher education.
- k. The Indian affairs commission.
- l. The industrial commission with respect to the activities of the Bank of North Dakota, North Dakota housing finance agency, public finance authority, North Dakota mill and elevator association, North Dakota farm finance agency, the North Dakota transmission authority, and the North Dakota pipeline authority.
- m. The department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4.
- n. The pardon advisory board.
- o. The parks and recreation department.
- p. The parole board.
- q. The state fair association.
- r. The attorney general with respect to activities of the state toxicologist and the state crime laboratory.
- s. The administrative committee on veterans' affairs except with respect to rules relating to the supervision and government of the veterans' home and the implementation of programs or services provided by the veterans' home.

- t. The industrial commission with respect to the lignite research fund except as required under section 57-61-01.5.
- u. The attorney general with respect to guidelines adopted under section 12.1-32-15 for the risk assessment of sexual offenders, the risk level review process, and public disclosure of information under section 12.1-32-15.
- v. The commission on legal counsel for indigents.
- w. The attorney general with respect to twenty-four seven sobriety program guidelines and program fees.
- x. The industrial commission with respect to approving or setting water rates under chapter 61-40.

North Dakota Century Code Section 28-32-01(11) defines a rule as:

[T]he whole or a part of an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. The term includes the adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:

- a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.
- b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:
  - (1) Enable law violators to avoid detection;
  - (2) Facilitate disregard of requirements imposed by law; or
  - (3) Give a clearly improper advantage to persons who are in an adverse position to the state.
- c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.
- d. A rule concerning only the physical servicing, maintenance, or care of agency-owned or agency-operated facilities or property.
- e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.
- f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.
- g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.
- h. An agency budget.
- i. An opinion of the attorney general.
- j. A rule adopted by an agency selection committee under section 54-44.7-03.
- k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.

#### **Rulemaking Deadline**

North Dakota Century Code Section 28-32-07 provides any rule change, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the Legislative Council within 9 months of the effective date of the statutory change. If an agency needs additional time for the rule change, a request for additional time must be made to the Administrative Rules Committee. The committee may extend the time within which the agency must adopt the rule change if the request by the agency is supported by evidence the agency needs more time through no deliberate fault of its own.

#### **Rulemaking Notice**

An agency is required by NDCC Section 28-32-10 to prepare a full notice and an abbreviated notice of rulemaking. The full notice must include a specific explanation of the proposed rule, include a determination of whether the proposed rule is expected to have an impact on the regulated community in excess of \$50,000, identify at least one location where interested parties may review the text of the proposed rule, provide the address to which

written comments concerning the proposed rule may be sent, provide the deadline for submission of written comments, provide a copy of a telephone number at which a copy of the rules and regulatory analysis may be requested, and provide the time and place set for oral hearing. In 2013 Section 28-32-10 was amended to require the full notice to include the bill number and subject matter of any legislation from the most recent legislative session which is being implemented by the proposed rule change. The full notice must be filed with the Legislative Council. A copy of the full notice must be mailed or emailed by the agency to each legislator who sponsored or cosponsored a bill being implemented by the proposed rules.

The abbreviated notice must be published at least once in each official county newspaper published in the state at least 20 days before the hearing on the rules.

In addition to other notice requirements, the Superintendent of Public Instruction is required to provide notice of any proposed rulemaking to each statewide association with a focus on education issues, which has requested to receive notice and to the superintendent of each public school district or the president of the school board, if the district has no superintendent. Notice by the Superintendent of Public Instruction must be by first-class mail or by email, if requested by the recipient.

For emergency rules, NDCC Section 28-32-03 requires the agency to attempt to provide notice to persons the agency can reasonably be expected to believe may have a substantial interest in the rules, meaning an interest that surpasses the common interest of all citizens. This section also requires the notice to identify the emergency status and effective date, notice be given to the Chairman of the Administrative Rules Committee, and the Legislative Council publish the notice and pending rules on its website.

#### **Hearings**

An agency is required by NDCC Section 28-32-11 to adopt a procedure to afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing, concerning a proposed rule, including data respecting the impact of the proposed rule. The agency is required to consider fully and make a written record of its consideration of all written and oral submissions respecting a proposed rule before the adoption, amendment, or repeal of any rule not of an emergency nature. An agency is required by NDCC Section 28-32-11 to adopt a procedure to allow interested parties to request and receive notice directly from the agency of the date and place proposed rules will be reviewed by the Administrative Rules Committee.

#### **Comments**

Agencies are required by NDCC Section 28-32-12 to allow a comment period of at least 10 days after the conclusion of a rulemaking hearing during which the agency will receive written data, views, or arguments concerning the proposed rule. Written comments received by the agency must be made a part of the rulemaking record to be considered by the agency before final action on the rule.

#### **Emergency Rules**

North Dakota Century Code Section 28-32-03 allows an agency, with approval of the Governor, to adopt rules on an emergency basis because of imminent peril to the public health, safety, or welfare; because a delay is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency; when reasonably necessary to avoid a delay in implementing an appropriations measure; or when necessary to meet a mandate of federal law. An emergency rule may be declared effective no earlier than the date of filing notice of rulemaking with the Legislative Council. An emergency rule becomes ineffective if it is not adopted as a final rule within 180 days after its declared effective date.

An agency making emergency rules is required to attempt to provide notice of the emergency rules to persons the agency can reasonably be expected to believe may have a substantial interest in the rules, meaning an interest in the effect of the rules which surpasses the common interest of all citizens. North Dakota Century Code Section 28-32-03 also requires the agency to notify the Chairman of the Administrative Rules Committee of emergency rules and their effective date and grounds for emergency status. The Legislative Council is required to place the notice of emergency rules on its website.

#### **Attorney General Review**

North Dakota Century Code Section 28-32-14 requires review by the Attorney General of all administrative rules and provides the Attorney General may not approve a rule as to legality if the rule exceeds the statutory authority of the agency or the rule is written in a manner that is not concise or easily understandable, or procedural requirements for adopting the rule are not substantially met.

#### **Rule Notice Service**

Under NDCC Section 28-32-10, the Legislative Council is to establish a procedure to allow any interested person to receive copies of every rulemaking notice filed with the Legislative Council, and the Administrative Rules Committee may establish a fee to receive these notices. The notice must be sent to subscribers within 15 business days after receipt. The committee set a \$50 annual charge for providing notice of proposed rulemaking. As of June 1, 1997, there were 31 paid subscribers to this service. As of July 1, 2009, there were 14 paid subscribers to this service. Some of the reduction in paid subscriptions may be attributable to the fact notices have been made available on the legislative branch webpage since 1998. With the availability of an RSS feed to receive rulemaking notices, there have not been any paid subscribers since January 2013.

#### **Regulatory Analysis**

An agency is required to prepare a regulatory analysis under NDCC Section 28-32-08, if within 20 days after the notice date for a rule hearing a written request for the analysis is filed by the Governor or a member of the Legislative Assembly or if the impact of the proposed rule on the regulated community is expected to exceed \$50,000. The regulatory analysis must describe persons that probably will be affected by the rule, including classes that will bear costs and classes that will benefit from the proposed rule. The analysis must describe probable economic impact of the proposed rule and probable cost to the agency to implement and enforce the rule.

#### **Fiscal Notes**

North Dakota Century Code Section 28-32-08.2 requires an agency, when rules are presented for Administrative Rules Committee review, to provide either a fiscal note or a statement that the rules have no fiscal effect. Fiscal effect means an effect on state revenues and expenditures, including any effect on funds controlled by the agency.

#### **Rules Affecting Small Entities**

Before adoption of any rule that may adversely impact small entities, the adopting agency must prepare an economic impact statement. A small entity includes a small business, small nonprofit organization, and small political subdivision.

#### **Constitutional Takings Assessment**

An agency is required to prepare a written assessment of constitutional takings implications of a proposed rule that may limit the use of real property under NDCC Section 28-32-09. The agency is required to assess the likelihood that the rule will result in a taking or regulatory taking of property and explain why no alternative action is available that would reduce impact on private property owners.

Under NDCC Section 28-32-09, any private landowner affected by a rule that limits the use of the landowner's private real property may file a written request for reconsideration of the application or need for the rule. Within 30 days of receiving the request, the agency must consider the request and provide a written response to the landowner of whether the agency intends to keep the rule in place, modify the rule, or repeal the rule.

#### **Air Quality Rules**

North Dakota Century Code Section 23-25-03.3 prohibits the State Department of Health from adopting air quality rules or standards affecting coal conversion and associated facilities, petroleum refineries, or oil and gas production and processing facilities, which are stricter than federal rules or standards under the Clean Air Act. The statute also prohibits the department from adopting air quality rules or standards affecting such facilities when there are no corresponding federal rules or standards unless the rules or standards are based on a risk assessment that demonstrates a substantial probability of significant impacts to public health or property, a cost-benefit analysis that affirmatively demonstrates the benefits of the more stringent or additional state rules and standards will exceed the anticipated costs, and the risk assessment and the cost-benefit analysis is independently peer-reviewed by qualified experts selected by the Air Pollution Control Advisory Council.

#### **Federal Guidelines**

North Dakota Century Code Section 28-32-04 prohibits agencies from adopting rules from federal guidelines that are not relevant to state regulatory programs. The section also provides an agency is required to repeal or amend any existing rule adopted from federal guidelines which is not relevant to state regulatory programs.

#### **Force of Law**

North Dakota Century Code Section 28-32-06 provides administrative rules have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the Administrative Rules Committee, or determined repealed by the Legislative Council because the authority for adoption of the rules is repealed or transferred to another agency. The fact administrative rules have the "force and



effect of law" is significant. The North Dakota Supreme Court has held that administrative practice or policy of an agency subject to the North Dakota Administrative Agencies Practice Act is invalid unless it has been adopted as an administrative rule in compliance with the Act--*Little v. Spaeth*, 394 N.W.2d 700 (1986). A more difficult question arises in considering the force and effect of rules adopted by an agency excluded from coverage under the Administrative Agencies Practice Act. In *Jensen v. Little*, 459 N.W.2d 237 (1990), a State Penitentiary inmate challenged the validity of the Penitentiary drug testing program and penalties as being adopted in violation of the Administrative Agencies Practice Act. The Supreme Court observed that the Department of Corrections and Rehabilitation was at that time a part of the office of the Director of Institutions and that the Director of Institutions was excluded from the definition of administrative agency and not subject to the Administrative Agencies Practice Act. Although the court did not directly address the effect of rules adopted by an agency outside the Administrative Agencies Practice Act, and in a footnote urged the Director and Warden to adopt more formal approval procedures for Penitentiary rules to diminish future challenges to the rules, the court tacitly upheld the Penitentiary rules by allowing the penalty to stand.

#### **GUIDELINES**

The Legislative Management is required by NDCC Section 28-32-10 to establish guidelines for agencies to comply with notice requirements under NDCC Chapter 28-32. Attached as an appendix is a copy of guidelines for agencies to follow in publishing notice of rulemaking.

#### **POSSIBLE RULE REVIEW**

During the 2015-16 interim, as rules were scheduled for review, each adopting agency was requested to provide the committee with written information in this format:

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.
3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.
4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person that offered comments at the public hearings on these rules.
5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.
6. An explanation of the subject matter of the rules and the reasons for adopting those rules.
7. Whether a regulatory analysis was required by NDCC Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.
8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.
9. Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.
10. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.
11. If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.

Representative Joshua A. Bosch, ND - District 44

**Appendix B - Summary of North Dakota Administrative Rules Committee Voided Rules**

**Testimony before the Senate Subcommittee on Regulatory Affairs and Federal Management  
Committee on Homeland Security and Government Affairs  
United States Senate**

**October 26, 2017**

<b>Time Period</b>	<b>Number of Agencies with a Rules or Rules Repealed</b>
*November 1994-October 1996	2 (Dept. of Human Services; Dept. of Public Instruction)
November 1996-October 1998	1 (Public Service Commission)
November 1998-November 2000	1 (Dept. of Human Services)
December 2000-November 2002	1 (Dept. of Financial Institutions)
December 2002-November 2004	0
December 2004-October 2006	1 (Board of Funeral Services)
January 2007-October 2008	1 (Racing Commission)
January 2009-October 2010	0
January 2011-October 2012	0
January 2013-October 2014	0
January 2015-October 2016	1 (Board of Dental Examiners)

\*The authority of the Administrative Rules Committee to void a rule resulted from 1995 House Bill No. 1284 (1995 S.L. ch. 310)

TESTIMONY OF STATE REPRESENTATIVE ARTHUR J. O'NEILL 69<sup>th</sup> HOUSE DISTRICT OF CONNECTICUT  
TO  
THE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE  
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

Good morning Chairman Lankford, Ranking Member Heitkamp and members of the Subcommittee. Thank you for your invitation to testify.

I am State Representative Arthur J. O'Neill from the 69<sup>th</sup> House District of Connecticut. I am a 27 year veteran of the Legislative Regulations Review Committee (LRRRC) of the Connecticut General Assembly and have previously served for six years as co-Chair of the Committee.

The Connecticut General Assembly first began reviewing regulations in 1945: the Secretary of State was required to submit to each General Assembly all the regulations promulgated during the preceding biennium for its study (the legislature met biennially). Any regulation which the General Assembly disapproved was void and not reissued (CGSA, 1945 Supp., § 42h). In 1963, the first LRRRC was established by statute (CGSA, § 4-48a). This committee was and is bicameral and bipartisan. It met during the interim between sessions and could only disapprove regulations that were already in effect. Disapproval voided the regulation unless the General Assembly overrode the committee's action at its next session. The legislature was not required to act on voided regulations.

In 1971 the current Legislative Regulations Review Committee was created pursuant to the Uniform Administrative Procedure Act (UAPA) (1971, PA 854). Under the 1971 law the Committee was authorized to review **proposed** regulations. The committee's disapproval of a regulation in 1976 led to a lawsuit challenging the legislature's role on constitutional grounds alleging a breach of the separation of powers principle. A Connecticut Superior Court ruled that the Committee's activity was unconstitutional (*Maloney v. Pac et al.* #20-6051 (1980)). The state Supreme Court in *Maloney v. Pac* (183 Conn. 313 (1981)) overturned the lower court decision. The reversal was on technical grounds, leaving the issue of constitutionality unresolved until 1982 when a constitutional amendment,

approved by the electorate, became effective and confirmed the legislature's authority to consider and disapprove administrative regulations (Ct. Const. Art. II on the Distribution of Powers).

The LRRC was established to ensure proper legislative review of **proposed** agency regulations. Administrative regulations have the force of law, therefore, closer scrutiny and control by the legislative branch is clearly in the public interest to ensure that regulations do not contravene legislative intent.

The Committee, which meets monthly, consists of 14 members: six Senators and eight House members. There are equal numbers of Republicans and Democrats. There are two co-Chairs: a Republican and a Democrat, one from each chamber. Each term the co-Chairs alternate. There is a system of Subcommittees which usually consists of two members: a Republican and a Democrat from each chamber. The Subcommittees are assigned to specific agencies. The Subcommittees review and, if necessary, make changes to the regulations. Regulations and other required documents are provided to each Committee member at least one month prior to the meeting at which action is to be taken. Legal opinions and recommendations from our legal staff and fiscal analysis from our fiscal staff are provided at least 10 days before such meeting.

The Committee can take the following types of action: (1) Approve in whole or in part, (2) Approve with technical corrections, (3) Reject without prejudice and (4) Disapprove. "Approval in part" allows the committee to make deletions. When deletions are made, sections or subsections are deleted not individual words. The Committee cannot add words to a regulation.

Technical changes are sometimes needed to correct spelling, punctuation, statutory references, and matters of style. Frequently, regulations are rejected without prejudice for lack of statutory authority. Rejection without prejudice requires the agency to resubmit the regulation with appropriate corrections within either 35 or 65 days depending on whether the regulation mandatory or permissive. There is no limit to the number of times that a regulation can be rejected without prejudice.

Disapproval is rare and signifies the Committee's interpretation that the proposed regulation is without statutory basis. Disapproval requires that the regulation be sent to an appropriate legislative committee for consideration during the next legislative session. The General Assembly then has the option to sustain or reverse the LRRC's action. Inaction by the General Assembly sustains the LRRC's Disapproval.

The Committee meets as necessary to consider Emergency Regulations.

The Committee functions as intended. It is an effective mechanism to protect legislative intent from executive branch dilution or distortion. It provides an opportunity for individuals interested in or affected by a regulation to influence the process without the time and expense of litigation. The Committee's bipartisan and bicameral structure enhances its effectiveness.

Some agency staffers who must deal with the Regulations Review Committee do not want to deal with the Committee and the additional process that we require. I consider that additional evidence of the effectiveness of the Committee in defending the authority of the legislative branch.

I welcome your questions.

**LEGISLATIVE REGULATION REVIEW COMMITTEE  
2017 - 2018 RULES**

- (1) The Legislative Regulation Review Committee ("Committee") shall meet on the fourth Tuesday of each month, except for the month of December, when the Committee shall meet on the third Tuesday. Any regular meeting may be postponed on agreement of the chairpersons. Special meetings may be called by either of the chairpersons. Notice of the date, time and place of a special meeting shall be (1) given not less than one day prior to the meeting, (2) posted on the Committee's Internet web site, and (3) posted in a conspicuous place in or near the office of the Committee.
- (2) At any meeting of the Committee, eight members shall constitute a quorum for the transaction of the business before the Committee.
- (3) Each member of the Committee shall have one vote. Any action by the Committee shall require the affirmative vote of the majority of those members present, except, no regulation proposed by an agency shall be disapproved or rejected without prejudice, in whole or in part, except by the affirmative vote of at least eight members of the Committee. There shall be no voting by proxy. Committee votes shall not be held open.
- (4) A complete record of all meetings of the Committee shall be kept on file in the office of the Committee. On and after March 27, 2012, all Committee records shall be maintained electronically.
- (5) The chairpersons shall act as co-presiding officers at all meetings of the Committee when both are present, unless they agree otherwise. If one of the chairpersons is absent, the other shall preside, if both are absent, the ranking members shall act as presiding officers pro-tempore, unless they agree otherwise.
- (6) The chairpersons may appoint such subcommittees as they deem necessary to carry on the work of the Committee. Such subcommittees shall have whatever authority may be delegated to them by the chairpersons, including, but not limited to, reviewing proposed regulations submitted by state agencies.

- (7) Submittal of a proposed regulation to the Committee shall be made in accordance with section 4-170 of the Connecticut general statutes. The date of submission for purposes of review by the Committee shall be the first Tuesday of the month. In accordance with said section, the Committee shall have sixty-five days from the date of submission to act on any new proposed regulation and thirty-five days from the date of submission to act on any proposed regulation previously rejected without prejudice by the Committee.
- (8) (a) Submittal of an emergency regulation to the Committee shall be made in accordance with section 4-168 of the Connecticut general statutes.
- (b) *Committee procedure for an emergency regulation shall be as follows:*
  - (1) Immediately upon receipt, an emergency regulation shall be forwarded to all members. The time period for Committee action shall begin the day following receipt by the Committee.
  - (2) In accordance with section 4-168 of the Connecticut general statutes, the Committee may either approve or disapprove, in whole or in part, an emergency regulation not later than ten days (excluding Saturdays, Sundays and holidays) prior to the proposed effective date of the regulation at a regular meeting, or may, upon the call of either chairperson or any five or more members, hold a special meeting for the purpose of approving or disapproving the regulation, in whole or in part.
  - (3) The failure of the committee to act on a proposed emergency regulation within such ten day period shall be deemed an approval.
- (9) Meeting agendas shall be posted on the Committee's Internet web site.
- (10) (a) Each proposed regulation submitted to the Committee shall include a submittal letter from the agency summarizing why the regulation is being promulgated, the substance of the regulation, and a summary of all public hearings held by the agency or comments received by the agency concerning the proposed regulation.

(b) For each proposed regulation submitted to the Committee, the statement of purpose required by section 4-170 of the Connecticut general statutes shall be a detailed, plain language narrative that includes:

- (1) The purpose of the regulation, including the problems, issues or circumstances that the regulation proposes to address,
- (2) A summary of the main provisions of the regulation, and
- (3) The legal effects of the regulation, including all the ways the regulation would change existing regulations or other law.

- (11) Requests by an agency for early consideration of a regulation shall be received not later than one week before the fourth Tuesday in the month prior to the month the agency wishes the regulation to be considered. If the request for early consideration is approved by an affirmative vote of the Committee, the regulation shall be submitted by the agency in final proposed form, with the approval of the Attorney General pursuant to section 4-169 of the Connecticut general statutes, not later than the first Tuesday of the month the regulation is to be considered.
- (12) (a) An agency may withdraw a proposed regulation from consideration by submitting an electronic notification of withdrawal to the Committee, prior to the convening of the meeting at which the Committee is scheduled to consider the regulation. Any regulation that is withdrawn prior to the convening of the meeting at which the Committee is scheduled to consider the regulation shall be treated as a new proposed regulation, for the purposes of section 4-170 of the Connecticut general statutes, when the agency next submits such regulation to the Committee. A regulation may be withdrawn after the Committee meeting is convened only by an affirmative vote of the Committee.
- (b) Any proposed regulation that is withdrawn by an agency after a Committee meeting is convened and with the approval of the Committee shall be treated as a new proposed regulation, for the purposes of section 4-170 of the Connecticut general statutes, when the agency next submits such regulation to the Committee, unless the Committee indicates the date by which such regulation shall next be submitted to the Committee.



- (13) Corrections or substitute pages for a proposed regulation already submitted to the Committee shall be submitted by the agency not later than one week prior to the date the regulation is to be acted upon by the Committee.
- (14) These rules may be amended by the affirmative vote of not less than eight members of the Committee at a meeting duly noticed and held for such purpose.

*Committee Rules were first adopted February 15, 1972 and amended on February 15, 1985, January 22, 1991, January 11, 1997, March 26, 2002, January 25, 2005, January 23, 2007, January 19, 2009, November 29, 2011, February 26, 2013, March 24, 2015, February 28, 2017.*

## The Connecticut General Assembly

### Legislative Commissioners' Office

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## Memorandum

**To:** Legislative Regulation Review Committee  
**From:** Legislative Commissioners' Office  
**Committee Meeting Date:** September 26, 2017

<b>Regulation No:</b>	2017-4B
<b>Agency:</b>	Department of Consumer Protection
<b>Subject Matter:</b>	Cottage Foods
<b>Statutory Authority:</b> (copy attached)	21a-62a

	Yes or No
<b>Mandatory</b>	Y
<b>Federal Requirement</b>	N
<b>Permissive</b>	N

### For the Committee's Information:

This is a resubmittal of regulations that were rejected without prejudice at the committee's meeting on March 28, 2017 and resubmitted and withdrawn by the agency prior to being considered at the August 22, 2017 meeting. The agency indicated in its letter that it had made several corrections to the proposed regulation that are not reflected in the resubmittal submitted to the committee. The resubmittal addresses the substantive concerns and technical corrections noted in the March 28, 2017, report, except as noted below. There are additional technical corrections noted below.

### Substantive Concerns:

**Technical Corrections:**

1. On page 1, in the introductory language of Section 1, "hereby", "through" and "Section" should be deleted for proper form.
2. On page 1, in section 21a-62a-1(1), "commissioner of" should be "Commissioner of" for proper form.
3. On page 1, lines 3 to 5, inclusive, of section 21a-62a-1(2) should be rewritten as follows for accuracy and proper form:  
  

"but who does not operate as a food establishment, as defined in section 2 of public act 17-93, a food establishment, as defined in section 21a-101-2 of the Regulations of Connecticut State Agencies, a retailer or distributor as those terms are defined in section 21a-92b of the Connecticut General Statutes or a food manufacturing establishment, as defined in section 21a-151 of the Connecticut General Statutes;"
4. On page 1, in section 21a-62a-1(4), "owner or resident" should be "owner- or resident-" for proper form.
5. On page 1, in section 21a-62a-1(5), "residents of a home" should be "residents of a private residential dwelling" for consistency with the defined term; and the two instances of "It" should be "A home kitchen" for clarity.
6. On page 1, in section 21a-62a-2, "**Requirements**" should be moved to the same line as "**Sec. 21a-62a-2**" for consistency.
7. On pages 1 and 2, in sections 21a-62a-3 to 21a-62a-5, inclusive, the numbers followed by a period should be subdivisions for consistency and proper form. For example, on page 1, in section 21a-62a-3, "1." and "2." should be "(1)" and "(2)", respectively.

**Recommendation:**

<input checked="" type="checkbox"/>	Approval in whole
<input checked="" type="checkbox"/>	with technical corrections
	with deletions
	with substitute pages
	Disapproval in whole or in part
	Rejection without prejudice

**Reviewed by:** Richard Hanratty / Shannon McCarthy

**Date:** September 6, 2017

**Sec. 21a-62a. Preparation of food in residential dwelling for sale. Regulations.** (a) Preparation of food in a private residential dwelling for sale for human consumption shall be allowed provided it conforms to the regulations adopted pursuant to subsection (b) of this section.

(b) The Commissioner of Consumer Protection, after consulting with the Commissioner of Public Health, shall adopt regulations, in accordance with the provisions of chapter 54, to allow the preparation of food in a private residential dwelling for sale for human consumption.

Section 2 of P.A. 17-93:

Sec. 2. (NEW) (*Effective October 1, 2017*) As used in this section and sections 3 to 10, inclusive, of this act:

(1) "Catering food service establishment" means a business that is involved in the (A) sale or distribution of food and drink prepared in bulk in one geographic location for retail service in individual portions in another location, or (B) preparation and service of food in a public or private venue that is not under the ownership or control of the operator of such business;

(2) "Certified food protection manager" means a food employee that has supervisory and management responsibility and the authority to direct and control food preparation and service;

(3) "Class 1 food establishment" means a food establishment that only offers for retail sale (A) prepackaged food that is not time or temperature controlled for safety, (B) commercially processed food that (i) is time or temperature controlled for safety and heated for hot holding, but (ii) is not permitted to be cooled, or (C) food prepared in the establishment that is not time or temperature controlled for safety;

(4) "Class 2 food establishment" means a retail food establishment that does not serve a population that is highly susceptible to food-borne illnesses and offers a limited menu of food that is prepared, cooked and served immediately, or that prepares and cooks food that is time or temperature controlled for safety and may require hot or cold holding, but that does not involve cooling;

(5) "Class 3 food establishment" means a retail food establishment that (A) does not serve a population that is highly susceptible to food-borne illnesses, and (B) has an extensive menu of foods, many of which are time or temperature controlled for safety and require complex preparation, including, but not limited to, handling of raw ingredients, cooking, cooling and reheating for hot holding;

- (6) "Class 4 food establishment" means a retail food establishment that serves a population that is highly susceptible to food-borne illnesses, including, but not limited to, preschool students, hospital patients and nursing home patients or residents, or that conducts specialized food processes, including, but not limited to, smoking, curing or reduced oxygen packaging for the purposes of extending the shelf life of the food;
- (7) "Cold holding" means maintained at a temperature of forty-one degrees Fahrenheit or below;
- (8) "Commissioner" means the Commissioner of Public Health or the commissioner's designee;
- (9) "Contact hour" means a minimum of fifty minutes of a training activity;
- (10) "Department" means the Department of Public Health;
- (11) "Director of health" means the director of a local health department or district health department appointed pursuant to section 19a-200 or 19a-242 of the general statutes;
- (12) "Food code" means the food code administered under section 3 of this act;
- (13) "Food establishment" means an operation that (A) stores, prepares, packages, serves, vends directly to the consumer or otherwise provides food for human consumption, including, but not limited to, a restaurant, catering food service establishment, food service establishment, temporary food service establishment, itinerant food vending establishment, market, conveyance used to transport people, institution or food bank, or (B) relinquishes possession of food to a consumer directly, or indirectly through a delivery service, including, but not limited to, home delivery of grocery orders or restaurant takeout orders or a delivery service that is provided by common carriers. "Food establishment" does not include a vending machine, as defined in section 21a-34 of the general statutes, a private residential dwelling in which food is prepared under section 21a-62a of the general statutes or a food manufacturing establishment, as defined in section 21a-151 of the general statutes;
- (14) "Food inspector" means a director of health, or his or her authorized agent, or a registered sanitarian who has been certified as a food inspector by the commissioner;
- (15) "Food inspection training officer" means a certified food inspector who has received training developed or approved by the commissioner and been

authorized by the commissioner to train candidates for food inspector certification;

(16) "Food-borne illness" means illness, including, but not limited to, illness due to heavy metal intoxications, staphylococcal food poisoning, botulism, salmonellosis, shigellosis, Clostridium perfringens intoxication and hepatitis A, acquired through the ingestion of a common-source food or water contaminated with a chemical, infectious agent or the toxic products of a chemical or infectious agent;

(17) "Food-borne outbreak" means illness, including, but not limited to, illness due to heavy metal intoxications, staphylococcal food poisoning, botulism, salmonellosis, shigellosis, Clostridium perfringens intoxication and hepatitis A, in two or more individuals, acquired through the ingestion of common-source food or water contaminated with a chemical, infectious agent or the toxic products of a chemical or infectious agent;

(18) "Hot holding" means maintained at a temperature of one hundred thirty-five degrees Fahrenheit or above;

(19) "Itinerant food vending establishment" means a vehicle-mounted, self-contained, mobile food establishment;

(20) "Permit" means a written document issued by a director of health that authorizes a person to operate a food establishment;

(21) "Temporary food service establishment" means a food establishment that operates for a period of not more than fourteen consecutive days in conjunction with a single event or celebration;

(22) "Time or temperature controlled for safety" means maintained at a certain temperature or maintained for a certain length of time, or both, to prevent microbial growth and toxin production; and

(23) "Variance" means a written document issued by the commissioner that authorizes a modification or waiver of one or more requirements of the food code.

## Connecticut General Assembly



### OFFICE OF FISCAL ANALYSIS

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September 14, 2017

TO: Senator Paul Doyle  
 Representative Christie Carpino  
 Co-Chairs, Regulations Review Committee

FROM: Neil Ayers, Director *NA*

SUBJECT: REVISED Review of Agenda Item 2017-004B for the September 26, 2017 Meeting

OFA has reviewed the state and municipal fiscal impact of item 2017-004B for the Department of Consumer Protection for the above meeting.<sup>1</sup> The following table summarizes our review.

Reg. #	Agency	Is Agency Estimate of State Impact Reasonable?	Is Agency Estimate of Municipal Impact Reasonable?	Did Agency Submit a Small Business Impact Statement? <sup>2</sup>	Did Agency Submit a Regulatory Flexibility Analysis? <sup>2</sup>
2017-004B	DCP	Yes	Yes	Yes	Yes

The agency has submitted a revised fiscal note that appropriately shows no fiscal impact to the state.

The state and certain municipalities may purchase, at a minimal cost, updated editions of referenced standards.

Please contact me if you have any questions or would like additional information.

<sup>1</sup> CGS Section 2-71c(c)(7) requires OFA to prepare "short analyses of the costs and long range projections of ... proposed agency regulations."

<sup>2</sup> CGS Section 4-168a requires agencies to prepare a small business impact statement on all regulation submittals and prepare a regulatory flexibility analysis statement when there is an impact on small businesses.

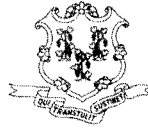


# The Connecticut General Assembly

## Legislative Commissioners' Office

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## Memorandum

**To:** Legislative Regulation Review Committee  
**From:** Legislative Commissioners' Office  
**Committee Meeting Date:** September 26, 2017

<b>Regulation No:</b>	2017-8A
<b>Agency:</b>	Insurance Department
<b>Subject Matter:</b>	Group Health, Drug Formulary, and Small Employer Group Health Rate Review
<b>Statutory Authority:</b> (copy attached)	38a-481, 38a-513

	Yes or No
<b>Mandatory</b>	Y
<b>Federal Requirement</b>	N
<b>Permissive</b>	N

### For the Committee's Information:

This is a resubmittal of regulations that were rejected without prejudice at the committee's April 25, 2017 meeting. The resubmittal addresses the substantive concerns and technical corrections noted in the April 13, 2017 report, except as noted below. There are additional substantive concerns and technical corrections..

**Substantive Concerns:**

1. On page 10, in section 38a-513-2(f)(3), the citation to "section 38a-513-4(c)(3) of the Regulations of Connecticut State Agencies" is not correct and it is unclear what citation is intended.
2. On page 15, in section 38a-513-3(s), within the definition of "Total Disability" subdivisions (1) and (2) irreconcilably conflict with one another. This definition should be clarified.
3. On page 17, in sections 38a-513-3(d)(1), (e)(1) and (f) (1), the citations to "section 38a-513-4(a)(13) of the Regulations of Connecticut State Agencies" is not correct but it is unclear what citation is intended.
4. On page 18, in sections 38a-513-4(g)(2) and (g) (8), the citations to "subdivisions (14)(A) and (14)(B) of this subsection" are incorrect and it is not clear what citations are intended.
5. On page 18, section 38a-513-4(g)(3) of the proposed regulations provides for a conversion privilege to an individual specified disease policy in the event a group specified disease policy is cancelled, nonrenewed or terminated; however, section 38a-513 of the Connecticut General Statutes authorizes regulations only for group specified disease policies. Accordingly, the application of such provision is unclear.

**Technical Corrections:**

1. Throughout the proposed regulations, numbers are expressed differently (e.g., "one thousand dollars (\$1,000)", "\$30.00", "50%", "eighty percent (80%)", "sixty-five (65)", "62"). One format should be selected and used consistently throughout.
2. On page 1, in section 38a-481-1, in the introductory language, "As used in Sections 38a-481-1 to 38a-481-[9] 12, inclusive, of the Regulations of Connecticut State Agencies, unless the context otherwise requires:" should be "As used in Sections 38a-481-1 to [38a-481-9] 38a-481-13, inclusive, of the Regulations of Connecticut State Agencies, unless the context otherwise requires:" for accuracy.
3. On page 1, in section 38a-481-1(2), an underlined period should be inserted after "Insurance Department" for consistency.
4. On page 1, in section 38a-481-1(10), "therapeutics Committee" should be "therapeutics committee" for consistency.
5. On page 3, in section 38a-481-10, "Committees" should be "committees" for consistency; and "shall be in form" should be "shall be in a form" for proper form.
6. On page 3, in section 38a-481-11, in the introductory language, "State" should be "state" for consistency.

7. On page 3, in section 38a-481-11(3), "specialty drugs" should be "specialty drug tiers" for consistency.
8. On page 4, in section 38a-481-12(c)(2), "member" should be "enrollee" for consistency.
9. On page 4, in the section heading of section 38a-481-13, "(NEW)" should be inserted before "Sec." for proper form; and "**Insureds Regarding Formulary Changes**" should be "**insureds regarding formulary changes**" for consistency.
10. On page 4, in section 38a-481-13, "days of advanced notice" should be "days' advance notice" for consistency and proper form; and "each insured utilizing a specific drug when that drug will be removed from the formulary or changed within the structure of prescription drug benefits" should be "each insured under the policy utilizing a prescription drug within the formulary before the insurer may remove such prescription drug from the formulary or make any change to the structure of prescription drug benefits under such policy" for clarity and in accordance with the committee's directive regarding mandates.
11. On page 8, in section 38a-513-1(3), an underlined period should be inserted after "Insurance Department" for consistency.
12. On page 8, in section 38a-513-1(8), "Group Specified Disease Policy" should be "Group specified disease policy" for proper form; and "section 38-513-1(c)" should be "section 38a\_513-1(c)", for accuracy
13. On page 8, in section 38a-513-1(12), an underlined period should be inserted after "Statutes" for consistency.
14. On page 9, in section 38a-513-1(13), "One Period of Confinement" should be "One period of confinement" for consistency.
15. On page 9, in section 38a-513-1(14), "Therapeutics committee" should be "therapeutics committee" for consistency.
16. On page 9, in section 38a-513-2(a), "section 38a-513-1(28)" should be "section 38a-513-1(b)(5)" for accuracy and "subject to the further exception that a" should be "except" for clarity.
17. On page 10, in section 38a-513-2(f)(6), the period should be a semicolon for consistency.
18. On page 10, in section 38a-513-2(f)(7), the comma after "38a-517b" should be deleted for proper form.
19. On page 10, in section 38a-513-2(g), "Section" should be "section" for consistency.
20. On page 11, in section 38a-513-3(a)(2), "explanatory" should be "explanation" for accuracy.

21. On page 11, in section 38a-513-3(a)(4), "policy" should be "coverage" and "contract" should be "policy" for consistency.
22. On page 13, in section 38a-513-3(g), "section 38-513-1(c)" should be "38a-513-1(c)" for accuracy.
23. On page 13, in section 38a-513-3(i), "subsection (b) of this section" should be "section 38a-513-1(b) of the Regulations of Connecticut State Agencies and "subsection (c) of this section" should be "section 38a-513-1(c) of the Regulations of Connecticut State Agencies", for accuracy.
24. On page 14, in section 38a-513-3(k), a space should be inserted between "(k)" and ' "Hospital" ' and the set of closed quotation marks before ' Hospital ' should be a set of opening quotation marks for proper form.
25. On page 14, in section 38a-513-3(l), a space should be inserted between "(l)" and ' "Medicare" ' and the set of closed quotation marks before ' Medicare ' should be a set of opening quotation marks for proper form.
26. On page 14, in section 38a-513-3(m), "registered nurse or a licensed practical nurse" should be "registered nurse or licensed practical nurse" for consistency.
27. On page 14, in section 38a-513-3(o), a space should be inserted between "(o)" and ' "Physician" ' and the set of closed quotation marks before ' Physician ' should be a set of opening quotation marks for proper form.
28. On page 15, in section 38a-513-3(s)(1), "occupation," or Engage" should be "occupation"; or engage" for proper form.
29. On page 15, in section 38a-513-3(s)(2), "occupation," or Engage" should be "occupation"; or engage" for proper form.
30. On page 16, in section 38a-513-4(b), "Hospital Confinement Indemnity" should be "Hospital confinement indemnity" for consistency.
31. On page 16, in section 38a-513-4(c), "Disability Income Protection" should be "Disability income protection" for consistency.
32. On pages 16 and 17, in sections 38a-513-4(b)(2) and 38a-513-4(c)(2), respectively, "described in" should be "described pursuant to" for clarity.
33. On page 17, in section 38a-513-4(d), "ONLY" should be "only" for proper form.
34. On page 17, in section 38a-513-4(d)(2), "described in" should be "described pursuant to" for clarity.
35. On page 17, in section 38a-513-4(e), "ONLY" should be "only" for consistency.

36. On page 17, in section 38a-513-4(e)(2), "described in" should be "described pursuant to" for clarity.
37. On page 17, in section 38a-513-4(f)(2), "described in" should be "described pursuant to" for clarity.
38. On page 17, in section 38a-513-4(g), "Specified Disease" should be "Specified disease" for consistency.
39. On page 20, in section 38a-513-4(g)(13)(B), designators "(1)" to "(3)", inclusive, should be "(i)" to "(iii)", respectively, for proper form.
40. On page 21, in section 38a-513-4(g)(14)(E), "described in" should be "described pursuant to" for clarity.
41. On page 21, in the section heading of section 38a-513-5, "**Formulary Annual Filing Requirements**" should be "**formulary annual filing requirements**" for consistency.
42. On page 21, in section 38a-513-5, "Committees" should be "committees" for consistency; and "shall be in form" should be "shall be in a form" for clarity.
43. On page 21, in section 38a-513-6, in the introductory language, "State" should be "state" for consistency; and designators "(a)" to "(j)", inclusive, should be "(1)" to "(10)", respectively, for proper form.
44. On page 22, in the section heading of section 38a-513-8, "**(NEW)**" should be inserted before "**Sec.**" for proper form; and "**Insureds Regarding Formulary Changes**" should be "**insureds regarding formulary changes**" for consistency.
45. On page 22, in section 38a-513-8, "days of advanced notice" should be "days' advance notice" for consistency; and "each insured utilizing a specific drug when that drug will be removed from the formulary or changed within the structure of prescription drug benefits" should be "each insured under the policy utilizing a prescription drug within the formulary before the insurer may remove such prescription drug from the formulary or make any change to the structure of prescription drug benefits under such policy" for clarity and in accordance with the committee's directive regarding mandates.

**Recommendation:**

<p>Approval in whole  with technical corrections  with deletions  with substitute pages  Disapproval in whole or in part  X Rejection without prejudice</p>
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**Reviewed by:** Brian F. Valko / Bradford M. Towson

**Date:** September 18, 2017

**Sec. 38a-481. (Formerly Sec. 38-165). Filing of policy form, application, classification of risks and rates. Approval of rates. Medicare supplement policies: Age, gender, previous claim or medical history rating prohibited. Reduction of payments on basis of Medicare eligibility. Optional life insurance rider. Treatment of health insurance issued to association or certain other insurance arrangements. Grandfathered and nongrandfathered plans.** (a) No individual health insurance policy shall be delivered or issued for delivery to any person in this state, nor shall any application, rider or endorsement be used in connection with such policy, until a copy of the form thereof and of the classification of risks and the premium rates have been filed with the commissioner. Rate filings shall include an actuarial memorandum that includes, but is not limited to, pricing assumptions and claims experience, and premium rates and loss ratios from the inception of the policy. The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, to establish a procedure for reviewing such policies. The commissioner shall disapprove the use of such form at any time if it does not comply with the requirements of law, or if it contains a provision or provisions that are unfair or deceptive or that encourage misrepresentation of the policy. The commissioner shall notify, in writing, the insurer that has filed any such form of the commissioner's disapproval, specifying the reasons for disapproval, and ordering that no such insurer shall deliver or issue for delivery to any person in this state a policy on or containing such form. The provisions of section 38a-19 shall apply to such orders. As used in this subsection, "loss ratio" means the ratio of incurred claims to earned premiums by the number of years of policy duration for all combined durations.

(b) No rate filed under the provisions of subsection (a) of this section shall be effective until it has been approved by the commissioner in accordance with regulations adopted pursuant to this subsection. The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, to prescribe standards to ensure that such rates shall not be excessive, inadequate or unfairly discriminatory. The commissioner may disapprove such rate if it fails to comply with such standards, except that no rate filed under the provisions of subsection (a) of this section for any Medicare supplement policy shall be effective unless approved in accordance with section 38a-474.

(c) No insurance company, fraternal benefit society, hospital service corporation, medical service corporation, health care center or other entity that delivers or issues for delivery in this state any Medicare supplement policies or certificates shall incorporate in its rates or determinations to grant coverage for Medicare supplement insurance policies or certificates any factors or values based on the age, gender, previous claims history or the medical condition of any person covered by such policy or certificate.

(d) No individual health insurance policy delivered, issued for delivery, renewed,

amended or continued in this state shall include any provision that reduces payments on the basis that an individual is eligible for Medicare by reason of age, disability or end-stage renal disease, unless such individual enrolls in Medicare. If such individual enrolls in Medicare, any such reduction shall be only to the extent such coverage is provided by Medicare.

(e) Nothing in this chapter shall preclude the issuance of an individual health insurance policy that includes an optional life insurance rider, provided the optional life insurance rider shall be filed with and approved by the Insurance Commissioner pursuant to section 38a-430. Any company offering such policies for sale in this state shall be licensed to sell life insurance in this state pursuant to the provisions of section 38a-41.

(f) Health insurance issued to an association or other insurance arrangement that is not made up solely of employer groups shall be treated as individual health insurance.

(g) (1) As used in this subsection, "Affordable Care Act" means the Patient Protection and Affordable Care Act, P.L. 111-148, as amended from time to time, and regulations adopted thereunder, and "grandfathered plan" has the same meaning as "grandfathered health plan" as provided in the Affordable Care Act.

(2) Each individual health insurance policy subject to the Affordable Care Act shall be offered on a guaranteed issue basis with respect to all eligible individuals or dependents.

(3) With respect to grandfathered plans of a policy under subdivision (2) of this subsection, the premium rates charged or offered shall be established on the basis of a single pool of all grandfathered plans.

(4) With respect to nongrandfathered plans of a policy under subdivision (2) of this subsection:

(A) The premium rates charged or offered shall be established on the basis of a single pool of all nongrandfathered plans, adjusted to reflect one or more of the following classifications:

(i) Age, in accordance with a uniform age rating curve established by the commissioner;

(ii) Geographic area, as defined by the commissioner;

(iii) Tobacco use, except that such rate may not vary by a ratio of greater than 1.5 to 1.0 and may only be applied with respect to individuals who may legally use tobacco under state and federal law. For purposes of this subparagraph, "tobacco use" means the use of tobacco products four or more times per week on average within a period not longer than



the six months immediately preceding. "Tobacco use" does not include the religious or ceremonial use of tobacco;

(B) Total premium rates for family coverage shall be determined by adding the premiums for each individual family member, except that with respect to family members under twenty-one years of age, the premiums for only the three oldest covered children shall be taken into account in determining the total premium rate for such family.

(5) Premium rates for a grandfathered or nongrandfathered policy under subdivision (2) of this subsection may vary by (A) actuarially justified differences in plan design, and (B) actuarially justified amounts to reflect the policy's provider network and administrative expense differences that can be reasonably allocated to such policy.

**Sec. 38a-513. Approval of policy forms and small employer rates. Medicare supplement policies. Age, gender, previous claim or medical history rating prohibited. Optional life insurance rider. Group specified disease policies.** (a)(1) No group health insurance policy, as defined by the commissioner, or certificate shall be delivered or issued for delivery in this state unless a copy of the form for such policy or certificate has been submitted to and approved by the commissioner under the regulations adopted pursuant to this section. The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, concerning the provisions, submission and approval of such policies and certificates and establishing a procedure for reviewing such policies and certificates. The commissioner shall disapprove the use of such form at any time if it does not comply with the requirements of law, or if it contains a provision or provisions that are unfair or deceptive or that encourage misrepresentation of the policy. The commissioner shall notify, in writing, the insurer that has filed any such form of the commissioner's disapproval, specifying the reasons for disapproval, and ordering that no such insurer shall deliver or issue for delivery to any person in this state a policy on or containing such form. The provisions of section 38a-19 shall apply to such order.

(2) No group health insurance policy or certificate for a small employer, as defined in section 38a-564, shall be delivered or issued for delivery in this state unless the premium rates have been submitted to and approved by the commissioner. Premium rate filings shall include an actuarial memorandum that includes, but is not limited to, pricing assumptions and claims experience, and premium rates and loss ratios from the inception of the policy. As used in this subdivision, "loss ratio" means the ratio of incurred claims to earned premiums by the number of years of policy duration for all combined durations.

(b) No insurance company, fraternal benefit society, hospital service corporation, medical service corporation, health care center or other entity that delivers or issues for delivery in this state any Medicare supplement policies or certificates shall incorporate in

its rates or determinations to grant coverage for Medicare supplement insurance policies or certificates any factors or values based on the age, gender, previous claims history or the medical condition of any person covered by such policy or certificate.

(c) Nothing in this chapter shall preclude the issuance of a group health insurance policy that includes an optional life insurance rider, provided the optional life insurance rider shall be filed with and approved by the Insurance Commissioner pursuant to section 38a-430. Any company offering such policies for sale in this state shall be licensed to sell life insurance in this state pursuant to the provisions of section 38a-41.

(d) Not later than January 1, 2009, the commissioner shall adopt regulations, in accordance with chapter 54, to establish minimum standards for benefits in group specified disease policies, certificates, riders, endorsements and benefits.

## Connecticut General Assembly



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September 8, 2017

TO: Senator Paul Doyle  
 Representative Christie Carpio  
 Co-Chairs, Regulations Review Committee

FROM: Neil Ayers, Director *NA*

SUBJECT: Review of Agenda Item 2017-008A for the September 26, 2017 Meeting

OFA has reviewed the state and municipal fiscal impact of item 2017-008A for the Department of Insurance for the above meeting.<sup>1</sup> The following table summarizes our review.

Reg. #	Agency	Is Agency Estimate of State Impact Reasonable?	Is Agency Estimate of Municipal Impact Reasonable?	Did Agency Submit a Small Business Impact Statement? <sup>2</sup>	Did Agency Submit a Regulatory Flexibility Analysis? <sup>2</sup>
2017-008A	DOI	Yes	Yes	Yes	No

The state and certain municipalities may purchase, at a minimal cost, updated editions of referenced standards.

Please contact me if you have any questions or would like additional information.

<sup>1</sup> CGS Section 2-71c(c)(7) requires OFA to prepare "short analyses of the costs and long range projections of ... proposed agency regulations."

<sup>2</sup> CGS Section 4-168a requires agencies to prepare a small business impact statement on all regulation submittals and prepare a regulatory flexibility analysis statement when there is an impact on small businesses.

## The Connecticut General Assembly

### Legislative Commissioners' Office

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## Memorandum

**To:** Legislative Regulation Review Committee  
**From:** Legislative Commissioners' Office  
**Committee Meeting Date:** September 26, 2017

<b>Regulation No:</b>	2017-14A
<b>Agency:</b>	Department of Energy and Environmental Protection
<b>Subject Matter:</b>	Consumer Products and Architectural and Industrial Maintenance Coatings
<b>Statutory Authority:</b> (copy attached)	22a-174

	Yes or No
Mandatory	N
Federal Requirement	Y
Permissive	Y

### For the Committee's Information:

This is a resubmittal of regulations that were rejected without prejudice at the committee's meeting on July 25, 2017. The resubmittal addresses the substantive concerns and technical corrections noted in the July 25, 2017 report. There are additional technical corrections, as noted below.

### Substantive Concerns:

**Technical Corrections:**

1. Throughout sections 1 and 2 of the proposed regulation, a space should be inserted between a closed bracket and the next character of text, for proper form. For example, on page 2, in section 22a-174-40(a)(16), "[ (14) ] (16)" should be "[ (14) ] (16)", for proper form. Similarly, on page 26, in section 22a-174-40(h)(1)(C), "[ (B) ] (C)" should be "[ (B) ] (C)", for proper form.
2. On page 5, in section 22a-174-40(a)(48)(G), "For the purposes of this definition" should be "For the purposes of this subdivision", for proper form.
3. On page 9, in section 22a-174-40(a)(79), an underlined comma should be inserted after "limited to", for proper form.
4. On page 9, in section 22a-174-40(a)(81), the language after subparagraph (B) beginning with "General purpose" should be moved to after the first sentence, for clarity. In addition, "except as qualified below" should be "except as qualified in the previous sentence", for clarity.
5. On page 10, in section 22a-174-40(a)(94), an underlined comma should be inserted after "undercoaters", for proper form.
6. On page 12, in section 22a-174-40(a)(106), in the seventh line, "definition. 'Personal Fragrance Product'" should be "subdivision. 'Personal fragrance product'", in the ninth line, "Fragrance Product" should be "fragrance product", and in the fourteenth line, "and" should be "or", for proper form.
7. On page 13, in section 22a-174-40(a)(112)(B), both instances of "For the purposes of this definition" should be "For the purposes of this subdivision", for proper form.
8. On page 14, in section 22a-174-40(a)(125), in the paragraph after (D)(ii), the semi-colons should be commas, for proper form.
9. On page 16, in sections 22a-174-40(a)(141)(B) and 22a-174-40(a)(143), "For purposes of this definition" should be "For purposes of this subdivision", for proper form.
10. On page 20, in section 22a-174-40(c)(16), "(16) (A)" should be "(16) (A)", for proper form.
11. On page 24, in section 22a-174-40(e)(4), "Reserved." should be underlined, for proper form.
12. On pages 27 to 30, in Table 40-1, in rows 2, 3, 7-11, 25, 30, 31, 33, 36, 37, 46, 49, 59, 60, 70, 89, 94 and 95 of column 1, the lower-cased word or words that are being capitalized should be bracketed out before the insertion of the capitalized word or words and the capitalized word or words should be underlined, for proper form. For example, in row 2, "Aerosol - Mist Spray" should be "Aerosol - Mist [spray] Spray". Similarly, in row

7. "Special Purpose Spray [Adhesives] Adhesive: Polystyrene Foam and Automotive Headliner" should be "Special Purpose Spray [Adhesives] Adhesive: Polystyrene [foam] Foam and [automotive] Automotive [headliner] Headliner".

13. On page 27, in Table 40-1, in row 6 of column 1, "Automotive Engine Compartment, and Flexible Vinyl" should be "[auto-motive] Automotive [engine] Engine [compartment] Compartment, and [flexible] Flexible [vinyl] Vinyl", for proper form.

14. On page 28, in Table 40-1, in row 23 of column 1, the text should not appear in bold type, for consistency with the text of the existing regulation.

15. On page 28, in Table 40-1, in row 26 of column 1, "**Product**" should be "**Products**", for consistency with the text of the existing regulation.

16. On pages 28 to 31, in Table 40-1, in rows 34, 38, 39, 41, 42, 63, 68, 71, 74, and 107, the lower-cased word or words that are being capitalized should be bracketed out before the insertion of the capitalized word or words and the capitalized word or words should be underlined, for proper form. Also, the word that appears in brackets in such row should be lower-cased, rather than capitalized, for consistency with the text of the existing regulation. For example, in row 34, "**Bathroom and Tile [Cleaners] Cleaner**" should be "**Bathroom and [tile] Tile [cleaners] Cleaner**" for proper form. Similarly, in row 42, "Non-[Aerosols] Aerosol (Ready-to-Use)" should be "Non-[aerosols] Aerosol [(ready-to-use)] (Ready-to-Use)", for proper form.

17. On page 29, in Table 40-1, in row 55 of column 1, "[Protectants]" should be "[protectants]", for consistency with the text of the existing regulation.

18. On page 30, in Table 40-1, in row 73 and 79 of column 1, "[Aerosols]" should be "[aerosols]", for consistency with the text of the existing regulation.

19. On page 51, in section 22a-174-41a(a)(25)(E), ", inclusive," should be inserted after "(D)", for clarity and proper form.

20. On page 51, in section 22a-174-41a(a)(26), opening and closing quotes should be inserted around the second reference to "Fire-resistive coating", for proper form.

**Recommendation:**

<b>X</b>	<b>Approval in whole</b>
<b>X</b>	<b>with technical corrections</b>
	<b>with deletions</b>
	<b>with substitute pages</b>
	<b>Disapproval in whole or in part</b>
	<b>Rejection without prejudice</b>

**Reviewed by:** Bradford M. Towson / Shannon McCarthy

**Date:** September 13, 2017

**Sec. 22a-174. (Formerly Sec. 19-508). Powers of the commissioner. Regulations.**

**Fees. Exemptions. General permits. Appeal of commissioner's action re permit**

**applications.** (a) The commissioner, in the manner provided in subdivision (1) of section 22a-6, shall have the power to formulate, adopt, amend and repeal regulations to control and prohibit air pollution throughout the state or in such areas of the state as are affected thereby, which regulations shall be consistent with the federal Air Pollution Control Act and which qualify the state and its municipalities for available federal grants. Any person heard at the public hearing on any such regulation shall be given written notice of the determination of the commissioner.

(b) The commissioner shall have the power to (1) enter into contracts with technical consultants, including, but not limited to, nonprofit corporations created for the purpose of facilitating the state's implementation of multistate air pollution control programs, for special studies, advice and assistance; to consult with and advise and exchange information with other departments or agencies of the state; and (2) serve on the board of directors of a nonprofit corporation, including, but not limited to, a nonprofit corporation created for the purpose of facilitating the state's implementation of multistate air pollution control programs.

(c) The commissioner shall have the power, in accordance with regulations adopted by him, (1) to require that a person, before undertaking the construction, installation, enlargement or establishment of a new air contaminant source specified in the regulations adopted under subsection (a) of this section, submit to him plans, specifications and such information as he deems reasonably necessary relating to the construction, installation, enlargement, or establishment of such new air contaminant source; (2) to issue a permit approving such plans and specifications and permitting the construction, installation, enlargement or establishment of the new air contaminant source in accordance with such plans, or to issue an order requiring that such plans and specifications be modified as a condition to his approving them and issuing a permit allowing such construction, installation, enlargement or establishment in accordance therewith, or to issue an order rejecting such plans and specifications and prohibiting construction, installation, enlargement or establishment of a new air contaminant source in accordance with the plans and specifications submitted; (3) to require periodic inspection and maintenance of combustion equipment and other sources of air pollution; (4) to require any person to maintain such records relating to air pollution or to the operation of facilities designed to abate air pollution as he deems necessary to carry out the provisions of this chapter and section 14-164c; (5) to require that a person in control of an air contaminant source specified in the regulations adopted under subsection (a), obtain a permit to operate such source if the source (A) is subject to any regulations adopted by the commissioner concerning high risk hazardous air pollutants, (B) burns waste oil, (C) is allowed by the



commissioner, pursuant to regulations adopted under subsection (a), to exceed emission limits for sulfur compounds, (D) is issued an order pursuant to section 22a-178, or (E) violates any provision of this chapter, or any regulation, order or permit adopted or issued thereunder; (6) to require that a person in control of an air contaminant source who is not required to obtain a permit pursuant to this subsection register with him and provide such information as he deems necessary to maintain his inventory of air pollution sources and the commissioner may require renewal of such registration at intervals he deems necessary to maintain such inventory; (7) to require a permit for any source regulated under the federal Clean Air Act Amendments of 1990, P.L. 101-549; (8) to refuse to issue a permit if the Environmental Protection Agency objects to its issuance in a timely manner under Title V of the federal Clean Air Act Amendments of 1990; and (9) notwithstanding any regulation adopted under this chapter, to require that any source permitted under Title V of the federal Clean Air Act Amendments of 1990 shall comply with all applicable standards set forth in the Code of Federal Regulations, Title 40, Parts 51, 52, 59, 60, 61, 63, 68, 70, 72 to 78, inclusive, and 82, as amended from time to time.

(d) The commissioner shall have all incidental powers necessary to carry out the purposes of this chapter and section 14-164c.

(e) As used in this subsection, "contiguous" means abutting or adjoining without consideration of the actual or projected existence of roadways, walkways, plazas, parks or other minor intervening features; "indirect source" means any building, structure, facility, installation or combination thereof, that has or leads to associated activity as a result of which any air pollutant is or may be emitted. The commissioner shall not require the submission of plans and specifications under indirect source regulations adopted pursuant to subdivisions (1) and (2) of subsection (c) of this section for proposed construction to be undertaken within a redevelopment area or urban renewal project, as defined in chapter 130, provided (1) the proposed construction is pursuant to a plan for such redevelopment area or urban renewal project adopted pursuant to section 8-127 prior to October 1, 1974, or to a modification of such plan, (2) the proposed construction is part of a contiguous, single purpose or multipurpose development or developments and (3) site clearance or construction had commenced on a portion of the site of such development or developments prior to October 1, 1974, nor shall the commissioner issue any order pursuant to subdivision (1) of subsection (c) of this section pertaining to the enforcement of indirect source regulations with respect to such proposed construction within such redevelopment areas and urban renewal projects. In the event that the modification of any such plan after October 1, 1974, would result in the proposed construction generating substantially more motor vehicle traffic than would have been generated prior to such modification, the submission of plans and specifications shall be required for such proposed modification. The commissioner shall not require the renewal of an indirect source operating permit

issued in accordance with subsection (c) of this section unless such indirect source no longer conforms with plans, specifications or other information submitted to said commissioner in accordance with said subsection (c).

(f) The commissioner shall allow the open burning of brush on residential property, provided the burning is conducted by the resident of the property or the agent of the resident and a permit for such burning is obtained from the local open burning official of the municipality in which the property is located, and the open burning of brush in municipal landfills, transfer stations and municipal recycling centers, provided a permit for such burning is obtained from the fire marshal of the municipality where the facility is located, except that no open burning of brush shall occur (1) when national or state ambient air quality standards may be exceeded; (2) where a hazardous health condition might be created; (3) when the forest fire danger in the area is identified by the commissioner as extreme and where woodland or grass land is within one hundred feet of the proposed burn; (4) where there is an advisory from the commissioner of any air pollution episode; (5) where prohibited by an ordinance of the municipality; and (6) in the case of a municipal landfill, when such landfill is within an area designated as a hot spot on the open burning map prepared by the commissioner. A permit for the burning of brush at any municipal landfill, municipal transfer station or municipal recycling center shall be issued no more than six times in any calendar year. The proposed permit to burn brush at any municipal landfill, municipal transfer station or municipal recycling center shall be submitted to the commissioner by the fire marshal, with the approval of the chief elected official of the municipality in which the municipal landfill, municipal transfer station or municipal recycling center is located. The commissioner shall approve or disapprove the fire marshal's proposed permitting of burning of brush at a municipal landfill, municipal transfer station or municipal recycling center within a reasonable time of the filing of such application. The burning of leaves, demolition waste or other solid waste deposited in such landfill shall be prohibited. The burning of nonprocessed wood for campfires and bonfires is not prohibited if the burning is conducted so as not to create a nuisance and in accordance with any restrictions imposed on such burning. Nothing in this subsection or in any regulation adopted pursuant to this subsection shall affect the power of any municipality to regulate or ban the open burning of brush within its boundaries for any purpose. Notwithstanding any other provision of this section, fire breaks for the purpose of controlling forest fires and controlled fires in saltwater marshes to forestall uncontrolled fires are not prohibited. Open burning may be engaged in for any of the following purposes if the open burning official with jurisdiction over the area where the burning will occur issues an open burning permit: Fire-training exercises; eradication or control of insect infestations or disease; agricultural purposes; clearing vegetative debris following a natural disaster; and vegetative management or enhancement of wildlife habitat or ecological sustainability on municipal property or on any privately owned property permanently

dedicated as open space. Open burning for such purposes on state property may be engaged in with the written approval of the commissioner. Local burning officials nominated for the purposes of this subsection shall be nominated only by the chief executive officer of the municipality in which the official will serve and shall be certified by the commissioner. The chief executive officer may revoke the nomination. The commissioner may adopt regulations, in accordance with the provisions of chapter 54, governing open burning and may authorize or prohibit open burning consistent with this section. The regulations may require the payment of an application fee and inspection fee and may establish a certification procedure for local burning officials.

(g) The commissioner shall require, by regulations adopted in accordance with the provisions of chapter 54, the payment of a permit application fee sufficient to cover the reasonable costs of reviewing and acting upon an application for, and monitoring compliance with the terms and conditions of, any state or federal permit, license, order, certificate or approval required pursuant to this section. Any person obtaining a permit, pursuant to said regulations, for the construction or operation of a source of air pollution or for modification to an existing source of air pollution shall submit a permit fee of twice the amount of the fee established by regulations in effect on July 1, 1990. The commissioner shall require the payment of a permit application fee of two hundred dollars.

(h) The commissioner may require, by regulations adopted in accordance with the provisions of chapter 54, payment of a fee by the owner or operator of a source of air pollution, sufficient to cover the reasonable cost of a visual test of an air pollution control device through the use of a dust compound in the detection of leaks in such device, or the monitoring of such test, provided such fee may not exceed the average cost to the department for the conduct or monitoring of such tests plus ten per cent of such average cost. Except as specified in section 22a-27u, all payments received by the commissioner pursuant to this subsection shall be deposited in the General Fund and credited to the appropriations of the Department of Energy and Environmental Protection in accordance with the provisions of section 4-86.

(i) Notwithstanding the provisions of subsections (g) and (h) of this section, no municipality shall be required to pay more than fifty per cent of any fee established by the commissioner pursuant to said subsections.

(j) Fees or increased fees prescribed by this section shall not be applicable to residential property.

(k) (1) The commissioner may issue a general permit with respect to a category of new or existing stationary air pollution sources, except with respect to a source which is already covered by an individual permit, provided the general permit is not inconsistent with the

federal Clean Air Act, as amended in 1990, 42 USC, Sections 7401 et seq., and as it may be further amended from time to time. Any person conducting an activity for which a general permit has been issued shall not be required to obtain an individual permit under this section, except as provided in subdivision (5) of this subsection. The general permit may regulate a category of sources which, whether or not requiring a permit under the federal Clean Air Act, (A) involve the same or substantially similar types of operations or substances, (B) require the same types of pollution control equipment or other operating conditions, standards or limitations, and (C) require the same or similar monitoring, and which, in the opinion of the commissioner, are more appropriately controlled under a general permit than under an individual permit. The general permit may require that any person proposing to conduct any activity under the general permit register such activity, including obtaining approval from the commissioner, before the general permit becomes effective as to such activity, and may include such other conditions as the commissioner deems appropriate, including, but not limited to, management practices and verification and reporting requirements. Any such reports shall be made available to the public by the commissioner. The commissioner shall grant an application for approval under a general permit without repeating the notice and comment procedures provided under subdivision (2) of this subsection, and such a grant shall not be subject to judicial review under subdivision (4) of this subsection. Registrations and applications for approval under the general permit shall be submitted on forms prescribed by the commissioner; application forms concerning activities regulated under the federal Clean Air Act shall require that the applicant provide such information as may be required by that act. The commissioner shall prepare, and annually amend, a list of holders of general permits under this section, which list shall be made available to the public.

(2) Notwithstanding any other procedures in this chapter, any regulations adopted thereunder, and chapter 54, the commissioner may issue a general permit in accordance with the following procedures: (A) The commissioner shall publish in a newspaper, having a substantial circulation in the affected area or areas, notice of (i) intent to issue a general permit, (ii) the right to inspect the proposed general permit, (iii) the opportunity to submit written comments thereon, and (iv) the right to a public hearing if, within the comment period, the commissioner receives a petition signed by at least twenty-five persons provided the notice shall state that the right to a public hearing may be exercised upon request of any person if the permit regulates an activity which is subject to provisions of the federal Clean Air Act; (B) the administrator of the United States Environmental Protection Agency and any states affected by the general permit shall be given notice as may be required by the federal Clean Air Act; (C) the commissioner shall allow a comment period of thirty days following publication of notice under subparagraph (A) of this subdivision during which interested persons may submit written comments concerning the permit to the commissioner; (D) the commissioner shall not issue the general permit until

after the comment period and the public hearing, if one is held; (E) the commissioner shall publish notice of any general permit issued in a newspaper having a substantial circulation in the affected area or areas; and (F) summary suspension may be ordered in accordance with subsection (c) of section 4-182. Any person may request that the commissioner issue, modify, revoke or suspend a general permit in accordance with this subsection.

(3) Any general permit under this subsection shall be issued for a fixed term. A general permit covering an activity regulated under the federal Clean Air Act shall be issued for a term of no more than five years. A general permit covering an activity regulated under the federal Clean Air Act shall contain such additional conditions as may be required by that act.

(4) Notwithstanding any other provision of this chapter and chapter 54, with respect to a general permit concerning activities regulated under the federal Clean Air Act, any person who submitted timely comments thereon may appeal the issuance of such permit to the superior court in accordance with the provisions of section 4-183. Such appeal shall have precedence in the order of trial as provided in section 52-192.

(5) Subsequent to the issuance of a general permit, the commissioner may require a person whose activity is or may be covered by the general permit to apply for and obtain an individual permit pursuant to this chapter if he determines that an individual permit would better protect the land, air and waters of the state from pollution. The commissioner may require an individual permit under this subdivision in cases including, but not limited to, the following: (A) The permittee is not in compliance with the conditions of the general permit; (B) a change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollution applicable to the permitted activity; (C) circumstances have changed since the time the general permit was issued so that the permitted activity is no longer appropriately controlled under the general permit, or a temporary or permanent reduction or elimination of the permitted activity is necessary; or (D) a relevant change has occurred in the applicability of the federal Clean Air Act. In making the determination to require an individual permit, the commissioner may consider the location, character and size of the source and any other relevant factors. The commissioner may require an individual permit under this subdivision only if the person whose activity is covered by the general permit has been notified in writing that an individual permit is required. The notice shall include a brief statement of the reasons for requiring an individual permit, an application form, a statement setting a time for the person to file the application and a statement that the general permit as it applies to such person shall automatically terminate on the effective date of the individual permit. Such person shall forthwith apply for, and use best efforts to obtain, the individual permit. Any person may petition the commissioner to take action under this subdivision.

(6) The commissioner may adopt regulations, in accordance with the provisions of chapter 54, to carry out the purposes of this subsection.

(l) In any proceeding on an application for a permit which is required under 42 USC 7661a, the applicant, and any other person entitled under said section to obtain judicial review of the commissioner's final action on such application may appeal such action in accordance with the provisions of section 4-183.

(m) The commissioner shall not issue a permit for an asphalt batch plant or continuous mix facility under the provisions of this section until July 1, 2004, unless the commissioner determines that the issuance of the permit will result in an improvement of environmental performance of an existing asphalt batch plant or continuous mix plant. The provisions of this section shall apply to any application pending on May 5, 1998. Nothing in this section shall apply to applications for upgrading, replacing, consolidating or otherwise altering the physical plant of an existing facility provided such upgrade, replacement, consolidation or alteration results in an improvement of environmental performance or in reduced total emissions of air pollutants.

## Connecticut General Assembly



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September 8, 2017

TO: Senator Paul Doyle  
 Representative Christie Carpino  
 Co-Chairs, Regulations Review Committee

FROM: Neil Ayers, Director *NA*

SUBJECT: Review of Agenda Item 2017-014A for the September 26, 2017 Meeting

OFA has reviewed the state and municipal fiscal impact of item 2017-014A for the Department of Energy & Environmental Protection for the above meeting.<sup>1</sup> The following table summarizes our review.

Reg. #	Agency	Is Agency Estimate of State Impact Reasonable?	Is Agency Estimate of Municipal Impact Reasonable?	Did Agency Submit a Small Business Impact Statement? <sup>2</sup>	Did Agency Submit a Regulatory Flexibility Analysis? <sup>2</sup>
2017-014A	DEEP	Yes	Yes	Yes	No

The state and certain municipalities may purchase, at a minimal cost, updated editions of referenced standards.

Please contact me if you have any questions or would like additional information.

<sup>1</sup> CGS Section 2-71c(c)(7) requires OFA to prepare "short analyses of the costs and long range projections of ... proposed agency regulations."

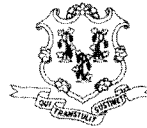
<sup>2</sup> CGS Section 4-168a requires agencies to prepare a small business impact statement on all regulation submittals and prepare a regulatory flexibility analysis statement when there is an impact on small businesses.

# The Connecticut General Assembly

## Legislative Commissioners' Office

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## Memorandum

**To:** Legislative Regulation Review Committee  
**From:** Legislative Commissioners' Office  
**Committee Meeting Date:** September 26, 2017

<b>Regulation No:</b>	2017-17
<b>Agency:</b>	Department of Consumer Protection
<b>Subject Matter:</b>	Architect Licensing
<b>Statutory Authority:</b> (copy attached)	20-289

	Yes or No
<b>Mandatory</b>	Y
<b>Federal Requirement</b>	N
<b>Permissive</b>	N

### For the Committee's Information:

### Substantive Concerns:

1. On page 3, in section 20-289-4a(a), the agency is bracketing the language that states that the board shall hold examinations and substituting "All examinations shall be held". The proposed change makes it unclear what entity is holding the examinations, whether the board, the commissioner or some other organization.



2. On page 5, in section 20-289-7, the agency is bracketing the examples of the approved format for seals and states that each person granted a license or certificate of authorization must use a seal, the format of which "shall be prescribed by the commissioner with the advice of the board." Section 20-293 requires each architect to have a seal "approved by the board" and "such other words or figures as the board deems necessary". The statute makes no mention of the commissioner prescribing the format and it is also unclear from this section how the format will be prescribed, since before the regulation itself prescribed the format.

#### **Technical Corrections:**

1. Throughout the proposed regulation, in the introductory language, "through" should be "to", "hereby" should be deleted and "to read" should be inserted after "amended", for proper form. For example, on page 1, the introductory language should be "Sections 20-289-1a to 20-289-6a, inclusive, of the Regulations of Connecticut State Agencies are amended to read as follows:".

2. Throughout the proposed regulations, references to "these regulations" should be "[these regulations] sections 20-289-1a to 20-289-12a of the Regulations of Connecticut State Agencies", for clarity. For example, on page 1, in section 20-289-1a, "these regulations" should be "[these regulations] sections 20-289-1a to 20-289-12a of the Regulations of Connecticut State Agencies". (See technical correction #16 regarding numbering.)

3. Throughout the proposed regulation, all of the language that the agency is proposing to be deleted should be surrounded by brackets, and not just the subdivision or subsection indicator. For example, on page 2, in section 20-289-3a, there should be one opening bracket before "must" and one closing bracket after "in effect." All of the other opening and closing brackets should be deleted, for proper form and clarity.

4. On page 1, in section 20-289-1a, the first words for the definitions contained in subdivisions (3) to (7), inclusive, and (11) and (12) should be in lower case letters, for consistency.

5. On page 2, in the sixth and seventh lines of section 20-289-3a(b)(2), the opening bracket after "determined" and the closing bracket after "Board," should be deleted and "or commissioner" should be inserted after "Board," for clarity and consistency.

6. On page 2, in the first line of section 20-289-3a(c), "[An] "AN.A.A.B" should be "An N.A.A.B.", for accuracy.

7. On page 4, in section 20-289-5a, a space should be inserted between "any", for proper form.

8. On page 4, in section 20-289-6a(b), a comma should be inserted after "file", for proper form.

9. On page 5, in section 20-289-7(c), "prescribed seals" should be "seals prescribed pursuant to subsection (a) or (b) of this section", for accuracy.
10. On page 5, in section 20-289-8(a), in the next to last line, "of this section" should be added after "[hereof]", for proper form.
11. On page 6, in section 20-289-9(c), in the next to last line, "or" should be inserted before "inactive", for accuracy.
12. On pages 6 and 7, in section 20-289-10a, the initial subdivisions should be subsections and the subsections should be subdivisions, for consistency and proper form. For example, on page 6, "(1)" should be "[ (1) ] (a)" and subsections "(a)", "(b)" and "(c)" should be "[ (a) ] (1)", "[ (b) ] (2)" and "[ (c) ] (3)" respectively. The same change should be made throughout the section and any subsequent internal references corrected. Similarly, on page 7, in subdivision (5), for subdivisions (1) to (5), inclusive, the subdivision references should be bracketed and underlined subparagraphs (A) to (E), inclusive, substituted, for proper form and consistency.
13. On page 6, in section 20-289-10a(2)(b), "will" should be "[will] shall", in accordance with the committee's directive regarding mandates.
14. On page 7, in section 20-289-10a(3)(a), "he" should be "[he] the architect", for consistency.
15. On page 7, in section 20-289-(5)(b)(5), "defined in" should be "[defined] described in", for accuracy.
16. On page 8, the agency is attempting to transfer section 20-289-14 to section 20-289-11a, but sections 20-289-11 to 20-289-12 have been repealed, so while the number 20-289-11a falls between the repealed numbers, the agency could use section 20-289-12a or some other number.

**Recommendation:**

<p>Approval in whole with technical corrections with deletions with substitute pages Disapproval in whole or in part X Rejection without prejudice</p>
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**Reviewed by:** Richard Hanratty / Shannon McCarthy

**Date:** September 12, 2017

**Sec. 20-289. Architectural Licensing Board in the Department of Consumer Protection. Regulation and licensure of architects. Appeals.** There shall be an Architectural Licensing Board in the Department of Consumer Protection. The board shall consist of five members. The Governor shall appoint two members of the board who shall be public members and three members of the board who shall be architects residing in this state. The Governor shall have the power to remove any member from office for misconduct, incapacity or neglect of duty. Members shall not be compensated for their services but shall be reimbursed for necessary expenses incurred in the performance of their duties. The board shall keep a record of its proceedings and a roster of all licensed architects entitled to practice architecture and of all persons holding certificates of authority under sections 20-295 and 20-295a of the general statutes, revised to 1968, and corporations holding certificates of authorization for the practice of architecture under section 20-298b in this state. The board shall adopt regulations, in accordance with chapter 54, concerning eligibility for architectural licensing examinations, appeals of examination grades, reciprocal licensing and such other matters as the board deems necessary to carry out the purposes of this chapter. The board shall, annually, prepare a roster of all licensed architects and the last-known mailing address of such architects. A copy of such roster shall be placed on file with the Secretary of the State and with the town building department of each town. The Commissioner of Consumer Protection, with advice and assistance from the board, shall adopt regulations, in accordance with chapter 54, (1) concerning professional ethics and conduct appropriate to establish and maintain a high standard of integrity and dignity in the practice of the profession, and (2) for the conduct of the board's affairs and for the examination of applicants for a license. The board shall, after public notice, hold at least one meeting per quarter, in each calendar year, for the purpose of considering applications for licenses and for the transaction of other business. Any person aggrieved by an order made under this chapter may appeal from such order as provided in section 4-183. Appeals under this section shall be privileged in respect to the order of trial and assignment.

## Connecticut General Assembly



### OFFICE OF FISCAL ANALYSIS

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September 8, 2017

TO: Senator Paul Doyle  
 Representative Christie Carpino  
 Co-Chairs, Regulations Review Committee

FROM: Neil Ayers, Director *NA*

SUBJECT: Review of Agenda Item 2017-017 for the September 26, 2017 Meeting

OFA has reviewed the state and municipal fiscal impact of item 2017-017 for the Department of Consumer Protection for the above meeting.<sup>1</sup> The following table summarizes our review.

Reg. #	Agency	Is Agency Estimate of State Impact Reasonable?	Is Agency Estimate of Municipal Impact Reasonable?	Did Agency Submit a Small Business Impact Statement? <sup>2</sup>	Did Agency Submit a Regulatory Flexibility Analysis? <sup>2</sup>
2017-017	DCP	Yes	Yes	Yes	No

The state and certain municipalities may purchase, at a minimal cost, updated editions of referenced standards.

Please contact me if you have any questions or would like additional information.

<sup>1</sup> CGS Section 2-71c(c)(7) requires OFA to prepare "short analyses of the costs and long range projections of ... proposed agency regulations."

<sup>2</sup> CGS Section 4-168a requires agencies to prepare a small business impact statement on all regulation submittals and prepare a regulatory flexibility analysis statement when there is an impact on small businesses.

Sec. 4-170. Legislative regulation review committee. Submission requirements for regulations. Disapproved regulations. Resubmitted regulations. (a) There shall be a standing legislative committee to review all regulations of the several state departments and agencies following the proposal thereof, which shall consist of eight members of the House of Representatives, four from each major party, to be appointed on the first Wednesday after the first Monday in January in the odd-numbered years, by the speaker of said House, and six members of the Senate, three from each major party, to be appointed on or before said dates by the president pro tempore of the Senate. The members shall serve for the balance of the term for which they were elected. Vacancies shall be filled by appointment by the authority making the appointment. There shall be two cochairpersons, one of whom shall be a member of the Senate and one of whom shall be a member of the House of Representatives, each appointed by the applicable appointing authority, provided the cochairpersons shall not be members of the same political party and shall be from alternate parties in the respective houses in each successive term. For purposes of this section, "appointing authority" means the speaker or minority leader of the House of Representatives and the president pro tempore or minority leader of the Senate, as appropriate according to the respective house and party of the member to be appointed. Each chairperson may call meetings of the committee for the performance of its duties.

(b) (1) No adoption, amendment or repeal of any regulation, except a regulation issued pursuant to subsection (g) of section 4-168, shall be effective until (A) an electronic copy of the proposed regulation approved by the Attorney General, as provided in section 4-169, and an electronic copy of the regulatory flexibility analysis as provided in section 4-168a are submitted to the standing legislative regulation review committee in a manner designated by the committee, by the agency proposing the regulation, (B) the regulation is approved by the committee, at a regular meeting or a special meeting called for the purpose, and (C) a certified electronic copy of the regulation is submitted to the office of the Secretary of the State by the agency, as provided in section 4-172, and the regulation is posted on the eRegulations System by the Secretary. (2) The date of submission for purposes of subsection (c) of this section shall be the first Tuesday of each month. Any regulation received by the committee on or before the first Tuesday of a month shall be deemed to have been submitted on the first Tuesday of that month. Any regulation submitted after the first Tuesday of a month shall be deemed to be submitted on the first Tuesday of the next succeeding month. (3) The form of proposed regulations which are submitted to the committee shall be as follows: New language added to an existing regulation shall be underlined; language to be deleted shall be enclosed in brackets and a new regulation or new section of a regulation shall be preceded by the word "(NEW)" in capital letters. Each proposed regulation shall have a statement of its purpose following the final section of the regulation. (4) The committee may permit any proposed regulation, including, but not limited to, a proposed regulation which by reference incorporates in whole or in part, any other code, rule, regulation, standard or specification, to be submitted in summary form together with a statement of purpose for the proposed regulation. On and after October 1, 1994, if the committee finds that a federal statute requires, as a condition of the state exercising regulatory authority, that a Connecticut regulation at all times must be identical to a federal statute or regulation, then the committee may approve a Connecticut regulation that by reference specifically incorporates future amendments to such federal statute or regulation provided the agency that proposed the Connecticut regulation shall submit for approval amendments to such Connecticut regulations to the committee not later than thirty days after the effective date of such amendment, and provided

further the committee may hold a public hearing on such Connecticut amendments. (5) The agency shall also provide the committee with a copy of the fiscal note prepared pursuant to subsection (a) of section 4-168. At the time of submission to the committee, the agency shall submit an electronic copy of the proposed regulation and the fiscal note to (A) the Office of Fiscal Analysis which, not later than seven days after receipt, shall submit an analysis of the fiscal note to the committee; and (B) each joint standing committee of the General Assembly having cognizance of the subject matter of the proposed regulation. No regulation shall be found invalid due to the failure of an agency to submit an electronic copy of the proposed regulation and the fiscal note to each committee of cognizance, provided such regulation and fiscal note have been electronically submitted to one such committee.

(c) The committee shall review all proposed regulations and, in its discretion, may hold public hearings on any proposed regulation and may approve, disapprove or reject without prejudice, in whole or in part, any such regulation. If the committee fails to so approve, disapprove or reject without prejudice a proposed regulation, within sixty-five days after the date of submission as provided in subsection (b) of this section, the committee shall be deemed to have approved the proposed regulation for purposes of this section.

(d) If the committee disapproves a proposed regulation in whole or in part, it shall give notice of the disapproval and the reasons for the disapproval to the agency, and no agency shall thereafter issue any regulation or directive or take other action to implement such disapproved regulation, or part thereof, as the case may be, except that the agency may adopt a substantively new regulation in accordance with the provisions of this chapter, provided the General Assembly may reverse such disapproval under the provisions of section 4-171. If the committee disapproves any regulation proposed for the purpose of implementing a federally subsidized or assisted program, the General Assembly shall be required to either sustain or reverse the disapproval.

(e) If the committee rejects a proposed regulation without prejudice, in whole or in part, it shall notify the agency of the reasons for the rejection and the agency, following approval by the Attorney General for legal sufficiency pursuant to section 4-169, shall resubmit the regulation in revised form to the committee, if the adoption of such regulation is required by the general statutes or any public or special act, not later than the first Tuesday of the second month following such rejection without prejudice and may so resubmit any other regulation, in the same manner as provided in this section for the initial submission. Each resubmission under this subsection shall include a summary of revisions identified by paragraph. The committee shall review and take action on such resubmitted regulation no later than thirty-five days after the date of submission, as provided in subsection (b) of this section. Posting of the notice on the eRegulations System pursuant to the provisions of section 4-168 shall not be required in the case of such resubmission.

(f) If an agency fails to submit any regulation approved in whole or in part by the standing legislative regulation review committee to the office of the Secretary of the State as provided in section 4-172, not later than fourteen days after the date of approval, the agency shall notify the committee, not later than five days after such fourteen-day period, of its reasons for failing to submit such regulation. If any agency fails to comply with the time limits established under subsection (c) of section 4-168, or under subsection (e) of this section, the administrative head of

such agency shall submit to the committee a written explanation of the reasons for such noncompliance. The committee, upon the affirmative vote of two-thirds of its members, may grant an extension of the time limits established under subsection (c) of section 4-168 and under subsection (e) of this section. If no such extension is granted, the administrative head of the agency shall personally appear before the standing legislative regulation review committee, at a time prescribed by the committee, to explain such failure to comply. After any such appearance, the committee may, upon the affirmative vote of two-thirds of its members, report such noncompliance to the Governor. Not later than fourteen days thereafter, the Governor shall report to the committee concerning the action the Governor has taken to ensure compliance with the provisions of section 4-168 and with the provisions of this section.

(1971, P.A. 854, S. 5; 1972, P.A. 258, S. 2; P.A. 73-396, S. 1, 2; P.A. 76-297, S. 2; 76-434, S. 3, 12; P.A. 78-283, S. 2; P.A. 79-623, S. 2, 8; P.A. 80-471, S. 4; P.A. 83-322, S. 1, 2; P.A. 85-608, S. 2; P.A. 86-250, S. 2, 4; 86-403, S. 9, 132; P.A. 88-317, S. 5, 107; P.A. 90-124, S. 2; P.A. 94-76; P.A. 95-41; P.A. 99-90, S. 5; P.A. 01-195, S. 75, 181; P.A. 05-288, S. 17; P.A. 09-19, S. 4; P.A. 11-150, S. 19; P.A. 12-92, S. 4, 5; P.A. 13-247, S. 31; 13-274, S. 6; P.A. 14-187, S. 5; P.A. 15-18, S. 6.)

History: 1972 act specified the form of proposed regulations to be presented to regulation review committee; P.A. 73-396 changed date of appointment from July 1 to the first Wednesday after the first Monday in January of odd-numbered years and required seventeen copies rather than one copy to be given the review committee; P.A. 76-297 allowed submission of regulations in summary form and included procedure for course of action if committee rejects resolution without prejudice; P.A. 76-434 deleted provision providing per diem and reimbursement for expenses; P.A. 78-283 required that regulations be filed in secretary of the state's office and required notification of review committee if filing not performed; P.A. 79-623 added provisions concerning fiscal notes; P.A. 80-471 revised form of submitted regulations and permitted summary form; P.A. 83-322 specified the date of submission of proposed regulations for the purposes of Subsec. (c), and required that the proposed regulations be submitted at the designated office of the legislative regulation review committee; P.A. 85-608 upon disapproval of a proposed regulation, mandated adoption of a substantively new regulation, when required by public act and permitted adoption of any other regulation, mandated resubmission of revised regulation, if the adoption of such regulation is required by public act and permitted resubmission of any other regulation and provided procedures upon failure to comply with time limits imposed by Sec. 4-168; P.A. 86-250 made technical changes, deleted requirement that agency adopt a substantively new regulation in case of disapproval by committee and specified time for resubmittal of regulation rejected without prejudice; P.A. 86-403 made technical change; P.A. 88-317 made technical changes, effective July 1, 1989, and applicable to agency proceedings commencing on or after that date; P.A. 90-124 amended Subsec. (b) to require that agency, at the time of submission of a proposed regulation to the regulation review committee, submit such regulation to each committee of the general assembly having cognizance of the subject of the regulation and provided no regulation shall be found invalid due to an agency's failure to submit such regulation to each such committee if such submission has been made to one such committee; P.A. 94-76 in Subsec. (b) authorized the approval of a Connecticut regulation which specifically incorporates future amendments to a federal statute or regulation; P.A. 95-41 amended Subsec. (e) to change date by which committees shall review and take



action on revised regulation from “within” to “no later than” thirty-five days after date of submission; P.A. 99-90 amended Subsec. (b) by dividing the Subsec. into Subdivs. and Subparas., substituting “eighteen copies” for “seventeen copies” and inserting “, in a manner designated by the committee,” in Subdiv. (1), and allowing new language in a regulation to be underlined as an alternative to capital letters, as determined by the committee, in Subdiv. (2) and made technical changes; P.A. 01-195 made technical changes in Subsec. (f), effective July 11, 2001; P.A. 05-288 made a technical change in Subsec. (c), effective July 13, 2005; P.A. 09-19 amended Subsec. (b)(1)(A) to include regulatory flexibility analyses and made technical changes in Subsec. (b)(5); P.A. 11-150 amended Subsec. (b) to substitute “an electronic copy” for “eighteen copies”, to require agency to submit an electronic copy of the regulation and fiscal note, and to make technical changes; P.A. 12-92 amended Subsec. (b)(1)(C) to add references to certified and electronic copy and to online posting of the regulation, effective July 1, 2013, and amended Subsec. (e) to replace reference to publication in Connecticut Law Journal with reference to posting online and amended Subsec. (f) to make technical changes, effective July 1, 2013, and applicable to regulations noticed on and after that date; P.A. 13-247 amended Subsec. (a) to replace provision re election of chairpersons with provision re appointment of chairpersons by appointing authority and to define “appointing authority”, amended Subsec. (b) to add references to electronic copy and posting of regulation on eRegulations System rather than online, to require new language to be underlined, to delete reference to capital letters for new language and to make technical changes, and amended Subsec. (e) to replace provision re posting online with provision re posting on eRegulations System, effective July 1, 2014, and applicable to regulations noticed on and after that date; P.A. 13-274 made identical changes as P.A. 13-247, effective July 1, 2014, and applicable to regulations noticed on and after that date; P.A. 14-187 amended Subsecs. (b), (c) and (d) to make technical changes and amended Subsec. (e) to add reference to approval for legal sufficiency by Attorney General and to make technical changes, effective October 1, 2014, and applicable to regulations noticed on and after that date; P.A. 15-18 made technical changes in Subsec. (f), effective June 5, 2015.

Cited. 165 C. 448; 168 C. 597; 171 C. 691; 172 C. 263; 173 C. 462; 177 C. 356.

Constitutionality of statute not in question since disputed regulation was not subject to review under the statutes. 183 C. 313. Cited. 186 C. 153; 187 C. 458; 191 C. 173; Id., 384; 200 C. 133; 202 C. 583; 204 C. 122; Id., 287; 215 C. 590; 217 C. 631; 221 C. 206; 232 C. 599; 234 C. 614; 239 C. 32.

Cited. 1 CA 1; 26 CA 132; 28 CA 145; 39 CA 216.

Cited. 34 CS 225; 42 CS 602.